

## A Fuller Fuller

*In our 2000 holiday greeting card (Fuller & Washington at Centuries' Ends) we quoted the leading scholar of Chief Justice Melville Fuller (James Ely) for the proposition that "over time many of Fuller's judicial achievements have been eclipsed." We gave short shrift, however, to Professor Ely's companion observations that the eclipse has been a product of changing times, not necessarily superior adjudication by later Courts, and that "many of the issues addressed by the Fuller Court have reemerged as part of the constitutional dialogue." For a quick, clear picture of Chief Justice Fuller, and of Professor Ely's analysis of his legacy, we offer the following (reprinted from volume 1 of the 1998 Journal of Supreme Court History, with the permission of Professor Ely).*

*The Editors*

### Melville W. Fuller Reconsidered

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Appointed Chief Justice by President Grover Cleveland in 1888, Melville W. Fuller presided over the Supreme Court during a pivotal era of American history.<sup>1</sup> Fuller and his colleagues were the first to grapple with a myriad of modern legal issues arising from the economic transformation of the United States into an industrial nation. In so doing, the Fuller Court rendered a host of important and well-known decisions –*Pollock*, *Debs*, *E.C. Knight Co.*, the insular cases, *Plessy*, *Lochner* –that defined economic and social institutions well into the twentieth century. The Court also ruled that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment, and invoked the dormant Commerce Clause to protect the national market from state-imposed obstacles to commerce.

By and large, however, history has not been kind to Fuller and his associates. Historians have been all too prone to echo the views of the Progressives, who pictured the Fuller Court as a handmaiden of big business. Thus, Owen M. Fiss in his recent book expressed the conventional wisdom: "By all accounts, the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst."<sup>2</sup> Yet such a bleak assessment is problematic. First, it is clearly subjective, because it depends upon the value choices of the evaluators. Several commentators have revealingly argued, for instance, that the problem with the pre-New Deal Court was that the Justices gave content to the property clauses of the Constitution and enforced rights associated with market freedom against government power. These apparently were the wrong rights.<sup>3</sup> But is there a principled basis by which we can decide that constitutional guarantees ought to be enforced? Should historical reputation turn upon what claims of right are currently fashionable in political or academic circles? Second, it ignores an array of scholarship suggesting that the traditional image of the Fuller Court is more a bogey constructed by the Progressives for political purposes than a product of careful

investigation. The Progressives, of course, were far from dispassionate observers. On the contrary, they championed greater governmental intervention in American life and constructed a version of constitutional history serviceable for their purpose.<sup>4</sup>

Revisionist scholarship has increasingly challenged the once standard account of late nineteenth century jurisprudence espoused by Progressives and New Dealers.<sup>5</sup> What has emerged is a more balanced portrait of the work of the Supreme Court at the turn of the century. Drawing upon this new literature, this article aims to take a fresh look at Fuller's leadership of the Court and to analyze the jurisprudence of the Fuller years. A fundamental goal is to dispel the entrenched mythology that has long distorted our understanding of the Fuller era.

### **Formative Experience**

Born in Maine in 1833 and educated at Bowdoin College, Fuller received most of his legal education through law firm apprenticeship. Like so many New Englanders of his generation, Fuller gravitated westward. He settled in Chicago, and over time established a thriving law practice focused on appellate advocacy. Fuller increasingly represented banks, railroads, and members of the Chicago business elite, such as Marshall Field. Despite this orientation toward a corporate practice, he valued professional independence. Fuller continued to litigate on behalf of individuals and municipal bodies, and steadfastly declined offers to become the regular counsel for any business. His extensive and diversified practice reached many fields of law, ranging from real property and torts to commercial law and contractual litigation. Upon Fuller's appointment to the Supreme Court, *Harper's Weekly* declared that he "goes to the bench with probably a wider experience of all branches of the law than has been enjoyed at the bar by any member of the Court."<sup>6</sup>

The legal principles applied by Fuller and his colleagues had deep roots in Jacksonian Democracy, with its stress on equal rights and its aversion to class legislation. Promoting market freedom, the Jacksonians attacked state-conferred monopolies, and laws that gave special privileges to particular groups. Turn-of-the-century jurists drew upon Jacksonian ideology as they sought to protect economic liberty and distinguish between appropriate regulation for the public welfare and illegitimate laws advancing special interests.<sup>7</sup> The importance of the Jacksonian ideology in shaping constitutional law applied with special force to Fuller. Reared in the Jacksonian political tradition, Fuller remained true to the political convictions forged in his youth. He frequently espoused the maxims of strict construction and states' rights. Indeed, this commitment to limited government would be the hallmark of Fuller's constitutional jurisprudence. "Paternalism," he observed in 1880, "with its constant intermeddling with individual freedom, has no place in a system which rests for its strength upon the self-reliant energies of the people."<sup>8</sup>

Soon after his move to Chicago, Fuller became active in Democratic Party affairs. In the late 1850s he supported Stephen A. Douglas and favored a compromise solution to the looming sectional crisis. Although Fuller backed military action to defeat secession, he was a sharp critic of the Lincoln administration. Elected to the Illinois House of Representatives in 1862, Fuller found himself quickly enveloped in controversy. He joined fellow Democrats in a series of resolutions assailing Lincoln's policies, and denounced the Emancipation Proclamation as an unconstitutional exercise of presidential power.

Notwithstanding the constant political wrangling, Fuller was able to gain the respect of political opponents. This ability to reach across party lines exemplified a crucial facet of Fuller's personality—his special capacity to establish harmonious personal relations with persons of diverse legal and political opinions. Fuller's genial nature and urbane sense of humor would serve him well both in professional life and as Chief Justice.

This brief stint in the legislature marked the extent of Fuller's interest in elective office. Yet he remained involved in politics and was a delegate to several Democratic Party national conventions. In time, Fuller formed a close relationship with Grover Cleveland. An enthusiastic backer of the Cleveland administration, Fuller shared the President's commitment to frugal government, a hard-money policy, and tariff reduction. The President was impressed with Fuller's ability and the two began a frequent correspondence. Cleveland consulted Fuller on the distribution of political patronage in Illinois. In 1885 Cleveland offered to name Fuller chairman of the Civil Service Commission. Civil service reform was a major goal of the Cleveland administration, and the chairmanship was a powerful position. Citing family needs, Fuller refused the appointment. A year later Cleveland tried again, asking Fuller to accept the post of Solicitor General. Despite Fuller's repeated rejection of federal positions, he and Cleveland remained fast friends. When Chief Justice Morrison R. Waite died in March of 1888, Cleveland resolved to select a candidate from Illinois who shared his conservative economic philosophy. Given their past association, it was not surprising that he settled on Fuller. The future Chief was initially reluctant to accept the nomination and requested time to consider. But Cleveland declined to wait and sent Fuller's name to the Senate.

Since Fuller was not well-known nationally, the public reaction to his nomination was muted, if guardedly favorable. Some opposition to confirmation emerged in the Senate. A group of Republican Senators expressed concern over Fuller's political activities during the Civil War. Others hoped to delay confirmation until after the upcoming presidential election. A bipartisan coalition, however, insisted on a vote, and Fuller was confirmed by a margin of forty-one to twenty.<sup>9</sup>

Cleveland's esteem for Fuller, incidentally, was enduring. The two corresponded regularly for years.<sup>10</sup> When re-elected to a second term as President in 1892, Cleveland offered Fuller the position of Secretary of State. Fuller declined, explaining that the "surrender of the highest judicial office in the world for a political position, even though so eminent, would tend to detract from the dignity and weight of the tribunal."<sup>11</sup>

### **Fuller as Chief Justice**

The new Chief Justice confronted a variety of daunting tasks. Because Fuller has universally received high marks as a judicial administrator, we should give attention to this facet of his tenure. Fuller first had to establish himself with the sitting Justices. Although he had argued before the Supreme Court on several occasions, Fuller was hardly a known quantity to his colleagues. Several Justices harbored private doubts that Fuller was a suitable choice. To complicate matters, Justice Stephen J. Field, the most influential jurist of the Gilded Age, had coveted the Chief's position for himself and was bitterly disappointed when Cleveland selected Fuller.<sup>12</sup> Nonetheless, through a combination of tact and deference, Fuller won the support and affection of his associates.

The composition of the Court changed frequently during Fuller's tenure. Eleven new Justices appointed by five Presidents joined the Court while Fuller was Chief. Yet Fuller maintained good working relations with the incoming Justices. He was especially close to David J. Brewer and Rufus W. Peckham. Fuller also formed a personal bond with Oliver Wendell Holmes, Jr.,<sup>13</sup> and indeed Holmes was one of the Justices most in accord with Fuller in deciding cases during their period of joint service. A masterful social leader, Fuller harnessed the talents of his independent-minded associates and prevented destructive personal feuds from damaging a collegial working environment. To this end, Fuller inaugurated the practice of requiring each Justice to shake hands with other Justices each morning before Conferences.

Two developments attest to Fuller's management skills. First, under his leadership the Justices rarely divided along partisan lines. As historian Charles Warren perceptively noted: "the slight importance . . . which was to be attached to the party designations of the Judges upon the Court was never better illustrated than during Fuller's Chief Justiceship."<sup>14</sup> Second, Fuller, like John Marshall, hoped to curtail dissenting opinions. Leading by example, Fuller wrote just thirty dissents during his years as Chief and compiled a low dissent rate of only 2.3 percent. Indeed, Fuller was remarkably successful in preserving consensual norms. Although unanimity proved difficult to secure in some prominent cases, that should not obscure the fact that the dissent rate under Fuller was consistently low.

As Chief Justice, Fuller was responsible for assigning the preparation of opinions when he was in the majority. Since Fuller generally voted with the majority he assigned most of the opinions during his service on the Court. Throughout the Court's history, many Chief Justices have chosen to write the decision in cases of greatest interest. Early in his tenure Fuller kept some of the major opinions, such as *Pollock* and *E.C. Knight Co.*, for himself. Thereafter, at considerable cost to his historical reputation, he generally assigned significant cases to others.

The use of assignment power by the Chief has sometimes generated resentment among his Brethren. Fuller largely avoided this problem by following an eminently fair and evenhanded approach to assignment decisions. There is no evidence that he used assignments to reward or punish colleagues for their views. Such a policy would have undermined Fuller's efforts to foster good will among the Justices. "In the assignment of decisions to the different judges," Holmes later observed, "his grounds were not always obvious, but I know how serious and solid they were and how remote was any partiality from his choice."<sup>15</sup>

An indefatigable worker, Fuller shouldered far more than his share of opinions for the Court. He authored 840 majority opinions, writing for the Court more often than any other Justice during his period of service. According to one calculation, Fuller was the fifth most productive opinion-writer in the Court's history.<sup>16</sup> Because he assigned most major cases to others, Fuller tended to write unglamorous opinions dealing with jurisdictional and procedural matters or commercial transactions. Few of these rulings had a long-term impact on the evolution of legal doctrine. Moreover, Fuller's judicial opinions suffered from his verbose and diffuse style of writing.<sup>17</sup> Yet Fuller's influence cannot be measured only by the opinions he authored. Reflecting the prevalent commitment to limited

government and the free market, he led the Supreme Court toward greater protection of property ownership and open access to interstate commerce.

When Fuller became Chief, he inherited a heavy backlog of appellate cases and an antiquated federal court structure. Spurred by industrial growth, numerous patent cases, and the impact of the Fourteenth Amendment, the workload of the Supreme Court increased steadily in the Gilded Age. There was a three year delay in the disposition of cases. Fuller had long favored the creation of intermediate courts of appeal to ease the burden of the Supreme Court, and as Chief Justice he actively supported the reform efforts that culminated in the Evarts Act of 1891. Circuit Court duties also claimed a share of Fuller's time. Under the Judiciary Act of 1789, Supreme Court Justices were required to hold circuit court in their respective circuits. Between 1888 and 1891, therefore, Fuller spent much of each summer presiding over trials and adjudicating largely routine matters of private law in the Fourth and Seventh Circuit Courts of Appeals. After passage of the Evarts Act, Fuller as circuit justice participated in a number of decisions rendered by the Fourth and Seventh Circuit. At the least, Fuller's experience demonstrates that active circuit court responsibilities for the Justices did not end with the Evarts Act but continued into the early twentieth century.

Fuller's most important ruling as circuit justice arose from the controversy over opening the 1893 World's Columbian Exposition in Chicago on Sundays. Congress had appropriated funds to help underwrite the costs of the fair on express condition that the exhibition not be open on Sundays. When the fair directors voted to open on that day, the federal government sought an injunction to halt such operations as a breach of the condition. Relying on traditional equitable principles, Fuller denied the injunction on the ground that there was no proof of irreparable injury to the government. Although phrased in terms of equitable relief, the decision underscores Fuller's lack of sympathy with Sunday closing laws. It can perhaps also be viewed as a step toward a new understanding about the place of religion in a changing and more diverse society.<sup>18</sup>

Other challenges, too, tested Fuller's administrative ability. For instance, he helped to orchestrate the 1897 retirement of Justice Field, whose declining health had been an increasing source of worry for the Justices. At times the varied demands of the chief justiceship almost overwhelmed Fuller. "I am so weary that I can hardly sit up," he told the Court's Reporter in May of 1890.<sup>19</sup> Yet Fuller proved adept at managing the Court's internal relations, keeping harmonious relations among the Justices, representing the Court in its dealings with other branches of government, and guiding the Court toward a more active role in American life. In sum, he made a significant contribution to the modern definition of the office of Chief Justice. The record fully justifies Felix Frankfurter's later observation that "there never was a better administrator on the Court than Fuller."<sup>20</sup>

### **Jurisprudence of the Fuller Court**

We should now turn to assess the jurisprudence of the Fuller era, and seek to uncover the premises that informed the exercise of judicial power. The constitutional foundation of the Fuller Court was the preservation of the individual liberty. "The utmost possible liberty to the individual, and the fullest possible protection to him and his property," Justice Brewer asserted in 1892, "is both the limitation and duty of government."<sup>21</sup> In contrast to modern liberalism, however, Fuller and his colleagues defined freedom largely in economic terms. To nineteenth century Americans, the

acquisition and enjoyment of property was among the most vital of liberty interests. Moreover, constitutional thought emphasized that security of private property was a vital prerequisite for the exercise of other individual liberties, such as free speech. “It should never be forgotten,” Justice Field observed in 1890, “that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.”<sup>22</sup> The Fuller Court aggressively defended private property and contractual freedom as a means to limit the reach of government and thereby safeguard liberty. Hence, the hallmark of Fuller era jurisprudence was an embrace of economic liberty, not some dark scheme to serve corporate interests. Even a critic of Fuller’s constitutional outlook conceded; “Liberty was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors.”<sup>23</sup>

In championing economic liberty, the Fuller Court drew upon the time-honored tradition of property-conscious constitutionalism. Property ownership and political liberty had long been linked in Anglo-American legal thought.<sup>24</sup> Historians have given inadequate attention to the close connection between the Fuller years and the constitutional principles espoused by the Framers of the Constitution. As Morton J. Horwitz noted, “by seeking to stigmatize the *Lochner* era, Progressive historians lost sight of the basic continuity in American constitutional history before the New Deal.”<sup>25</sup> Jennifer Nedelsky has similarly observed that “the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth century advocates of *laissez-faire*.”<sup>26</sup> Viewed in historical context, the work of the Fuller Court could best be understood as a fulfillment of the property-conscious attitudes that shaped the constitution-making process in 1787.

The Fuller Court’s solicitude for the rights of property owners stemmed from utilitarian grounds as well as philosophical imperatives. A steady flow of investment capital was vital to finance economic development. Associating security of private property with industrial growth, the Court therefore persistently labored to protect capital formation. In the railroad rate cases, for instance, the Justices stressed the importance of private capital, and expressed concern that stringent state controls would produce such an insufficient return as to discourage investment.<sup>27</sup> Excessive regulation would consequently not only destroy the value of existing property but inhibit new investment essential for development. Justice Peckham, writing for the Court in the landmark case of *Ex Parte Young*, pointedly observed:

Over eleven thousand millions of dollars . . . are invested in railroad property, owned by many hundreds of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property . . . .<sup>28</sup>

This concern with capital formation also played a role in the *Pollock* decisions invalidating the 1894 income tax. Critics pictured the controversial levy as an attack on wealth, a view shared by Justice Field when he declared: “The present assault on capital is but the beginning.”<sup>29</sup> As historian Morton Keller has perceptively noted with respect to late nineteenth century judicial behavior: “an old concern for private rights and individual freedom coexisted with the desire to foster the development of a national economy.”<sup>30</sup>

Although prepared to afford heightened protection to the rights of property owners, the Fuller Court's pattern of decision-making was complex and took account of other constitutional values. Foremost among these was a strong commitment to the federal system. Consistent with its dedication to a limited federal government, Fuller and his colleagues sought to preserve a large measure of autonomy for the states. Accordingly, Court tended to defer to state governance of criminal justice, race relations, and public morals.<sup>31</sup>

Even in the economic area, the Fuller Court saw an important role for the states. Not only were most state business regulations sustained, but the Justices strived to maintain a balance between federal and state authority over the economy. This is perhaps best illustrated by Fuller's opinion in *E.C. Knight Co.*, which distinguished between commerce and manufacturing and restricted the reach of the Sherman Act. Fuller explained:

Slight reflection will show that if the national power extends to all contracts and combinations of manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.<sup>32</sup>

To Fuller's mind, the prospect of plenary federal control over commerce threatened the place of the states in the constitutional system, and was more menacing than the supposed danger of business consolidations. The states' rights theme was also prominent in *Pollock*. Fuller viewed the Direct Tax Clause as one of the compromises at the Constitutional Convention designed to secure dual government.<sup>33</sup> If this "rule of protection could be frittered away," Fuller warned, "one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property."<sup>34</sup> In short, Fuller employed the Direct Tax Clause to protect the role of the states as well as individual property owners by curtailing federal taxing power.<sup>35</sup> He correctly perceived that the income tax would open the door for an expansion of federal power and a fundamental alteration of federal-state relations.

Of course, there was a degree of tension between the Fuller Court's defense of property rights and respect for state autonomy. State legislatures, acting under their police power to safeguard public health, safety, and morals, took the initiative in seeking to harness the new economic forces.<sup>36</sup> Inevitably, such exercise of state authority entrenched on the traditional prerogatives of property owners, stimulating a steady stream of legal challenges. The quandary inherent in protecting property owners while simultaneously upholding states' rights was strikingly evident in Fuller Court review of state-imposed railroad rates and state regulations that burdened interstate commerce. Although recognizing that railroads were subject to public control, the Fuller Court fashioned the fair value rule as a restraint on state rate-making authority.<sup>37</sup> Similarly, Fuller and his colleagues steadfastly championed the national market for goods. To this end, the Fuller Court closely scrutinized state laws that prevented the shipment of certain products across state lines. This commitment to free trade among the states led the Justices to wield forcefully the dormant Commerce Power to remove state obstacles to national economic life.<sup>38</sup> Indeed, to the annoyance of prohibition advocates, the Fuller Court maintained that freedom of interstate commerce encompassed the right to ship liquor into each state.<sup>39</sup>

The conflicting pull of support for private property rights and a high regard for federalism also informed the Fuller Court's takings jurisprudence. During Fuller's tenure, the Supreme Court first had an opportunity to address in a systematic manner the Takings Clause and brought a new vitality to this provision. In a number of important rulings, the Justices strengthened the Takings Clause as a guarantee of individual rights against arbitrary governmental power.<sup>40</sup> Stressing that the Takings Clause was an integral part of the Bill of Rights, a unanimous Court in *Monongahela Navigation Company* declared that the just compensation requirement "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."<sup>41</sup> The determination of just compensation is of critical importance, however, because payment of an inadequate compensation undermines the protective function of the Takings Clause. Accordingly, in *Monongahela Navigation* the Fuller Court insisted that the ascertainment of the amount of compensation was a judicial, not a legislative, function. The Justices then ruled that compensation "must be a full and perfect equivalent for the property taken" and that the value of land should be determined by its productiveness.<sup>42</sup>

Perhaps the most important contribution of the Fuller Court to takings jurisprudence was the extension of the just compensation requirement to the states. This step marked the initial acceptance of the view that the Due Process Clause of the Fourteenth Amendment made certain fundamental provisions of the Bill of Rights applicable to state and local government. In the seminal case of *Chicago, Burlington and Quincy Railroad Company v. Chicago*, the Justices held that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment.<sup>43</sup> The city contended that the amount of compensation to be awarded the railroad for the construction of a public street across land owned by the carrier was entirely a matter of local law and raised no federal question.

Writing for the Court, Justice John Marshall Harlan declared that the mere form of eminent domain proceedings did not satisfy due process unless provision was made for adequate compensation. "Due protection of the rights of property," he pointed out, "has been regarded as a vital principle of republican institutions."<sup>44</sup> The opinion rested on the premise that the right of compensation was a fundamental right inherent in free government. By virtue of *Chicago, Burlington*, the Due Process Clause operated as a just compensation requirement imposed on the states.

While moving to establish a vigorous takings jurisprudence, Fuller and his colleagues sought to strike a balance between national constitutional norms and state autonomy. This was particularly evident with respect to the "public use" requirement for the exercise of eminent domain. The Justices generally deferred to state decisions as to what should be considered public use. Consequently, the Court did not treat the public use requirement as a meaningful restraint on the use of eminent domain. In a line of cases, for instance, the Fuller Court sustained the acquisition of private property for purposes of irrigation or mining, even if the direct benefit was limited to a handful of individuals.<sup>45</sup>

## Place in History

From the foundation of the United States, economic liberty was treated as an essential element of constitutionalism. Indeed, federal courts had long afforded protection to the property rights of individuals.<sup>46</sup> What, then, accounts for the unique place of the Fuller era in Supreme Court history? The answer that emerges is that Fuller and his colleagues enforced entrepreneurial freedom with heightened vigor and daring. To this end, they strengthened substantive due process, crafted the liberty of contract doctrine, animated takings jurisprudence, and aggressively reviewed state and federal economic legislation.

Not surprisingly, this burst of judicial activism aroused opposition. Populists, Progressives, and historians who reflect their attitudes, have disparaged the work of the Fuller Court and maintained that any invocation of liberty was simply a cover for favoritism to business interests.<sup>47</sup> Adopting a conspiratorial tone, critics alleged that the Justices were thwarting popular will. Since this dark legend has colored historical accounts of the Fuller Court, it seems appropriate to consider various factors that buttress alternative evaluations. I wish to develop three points that may facilitate a better understanding of Fuller era jurisprudence.

In the first place, one should view the work of the Fuller Court in broad perspective. It bears emphasis that the Supreme Court under Fuller upheld far more economic regulations than it struck down. The Justices in fact demonstrated a considerable tolerance for legislation protecting public welfare and safety against harmful activities, as well as for measures enhancing public morals. A review of Fuller Court decisions does not support an interpretation of a Bench firmly resolved to frustrate all legislative initiatives.<sup>48</sup>

To be sure, the Justices carefully scrutinized both the goals allegedly served by government action as well as the reasonableness of the means employed to achieve the announced end. They declined to accept the ostensible purpose of the legislation at face value and independently weighed the evidence as to whether a regulatory measure was a valid exercise of the police power. In particular, the Fuller Court treated liberty of contract as the constitutional norm and required states to justify laws that infringed this right. Americans of the nineteenth century attached a high value to contractual freedom.<sup>49</sup> It was therefore an easy step for courts to conclude that the right to enter contracts and pursue lawful occupations deserved special protection by the judiciary.

This leads us to the much maligned *Lochner* decision in which the Court invoked the liberty of contract doctrine to invalidate a statute limiting the hours of work in bakeries.<sup>50</sup> One of the most important cases in American constitutional history, *Lochner* remains at the center of a continuing debate about the role of the judiciary.<sup>51</sup> My present purpose is not to enter that dialogue but rather to argue that *Lochner* was well grounded in the political economy of the day. Dismissing “the New Deal myth” about *Lochner*, Bruce Ackerman has aptly observed: “The *Lochner* Court was not making it up .... Peckham’s decision in *Lochner* has deep intellectual roots in our most successful movements of constitutional politics.”<sup>52</sup> Indeed, revisionist scholars have persuasively argued that *Lochner* vindicated economic liberty and has been unjustly castigated.<sup>53</sup> But whether one accepts that view or not, *Lochner* was not a typical case on which to build generalizations about the Fuller Court. In fact, Fuller and his colleagues rarely applied the liberty of contract doctrine.<sup>54</sup>

My second point is that the Fuller Court operated within the contours of dominant public opinion. Put another way, Fuller and his colleagues championed values broadly shared by turn-of-the-century Americans. As Robert Higgs has pointed out, most Americans in the 1890s were dedicated to limited government, private property, and contractual freedom.<sup>55</sup> President Cleveland, Fuller's friend, gave a classic formulation to this sentiment in 1887: ". . . the lesson should be constantly enforced that though the people support the Government, the Government should not support the people."<sup>56</sup> That the Fuller Court was in accord with the prevailing political ideology was made clear by the presidential election of 1896. William Jennings Bryant assailed the Fuller Court, urged wealth redistribution through an income tax, and called for increased governmental intervention in the economy.<sup>57</sup> Americans decisively rejected this Populist program in 1896 and again in 1900. It is entirely fanciful to posit that the general public in Fuller's day was yearning for big government and vast social welfare schemes.

A study of the popular reaction to leading decisions of the Fuller Court reinforces this conclusion. Aside from trade unionists, *Debs* was well received by most segments of public opinion.<sup>58</sup> The *Pollock* rulings surely aroused hostility in some quarters, but the Supreme Court did not lack for defenders. The *Washington Post*, for instance, proclaimed: "The income tax is dead. It is a case of Hallelujah."<sup>59</sup> As discussed above, public attitudes with respect to an income tax were directly tested in the presidential election of 1896. The outcome of that canvass seemingly ratified the *Pollock* decisions and in effect closed the door on an income levy for nearly twenty years.<sup>60</sup> One noted historian has concluded that *Pollock* "may not have been too far from the actual desires of the public."<sup>61</sup> Initial reaction to the *Lochner* ruling was subdued, and only later was it taken up as a *cause celebre* by Progressives.<sup>62</sup> In *Plessy v. Ferguson*, the Supreme Court placed its seal of approval on the emerging pattern of racial segregation in the South. Sadly, the outcome of *Plessy* was congruent with the racist assumptions that permeated popular and scholarly thought in the late nineteenth century. Because the decision embodied widely shared attitudes, it was not a source of contemporary controversy.<sup>63</sup>

In short, the Fuller Court, despite its activist bent, generally mirrored the attitudes of American society as a whole. As one scholar has observed, "*Lochner* era jurists realized the importance of public opinion in the evolution of constitutional law. In propounding laissez-faire constitutionalism, they believed public opinion was on their side."<sup>64</sup>

Thirdly, historians would do well to look with a skeptical eye at the Progressive legislative program. Too often the topic of property rights at the turn of the century has been presented within the simplistic context of a conflict between the public interest and a judiciary dedicated to big business. But it unfairly loads the historical deck to presume the benign purpose and effect of so-called reform legislation. The actual picture is much less tidy. There is room to doubt the efficacy of many of the regulations introduced by the Progressives. The Progressive faith in management of the economy by experts along scientific lines seems naive and almost quaint to modern eyes. Historian Herbert Hovenkamp has aptly observed: "Government regulation proved to be one of the great embarrassments of Progressive legal thought."<sup>65</sup> Certainly, Progressive era legislation proved no panacea and arguably created additional problems.<sup>66</sup> Although couched in terms of general benefit, much of the regulatory legislation was enacted at the behest of special interest groups. In fact, the

Fuller Court's skepticism about regulatory solutions and dedication to economic liberty may well have promoted the long-term public interest.

### **Fuller's Legacy**

This call for a reconsideration of Melville W. Fuller does not suggest uncritical celebration. Time has erased many of the achievements of the Fuller Court. We as a nation have traveled far from a constitutional order based on the principles of limited central government, states' rights, and respect for individual property ownership. On the contrary, judicial and scholarly opinion has embraced a greatly expanded role for government in American life. Property rights, the cornerstone of Fuller's libertarian jurisprudence, were seen as a barrier to establishing governmental authority over economic decisionmaking. Consequently, since the New Deal period the claims of property owners have been often ignored or belittled, in marked contrast to judicial solicitude for an expanding array of noneconomic rights. Further, an egalitarian emphasis on the plight of outsiders gradually replaced the Fuller Court's dedication to economic liberty as the principal constitutional value. One might well be tempted to dismiss the Fuller Court as a relic of another day.

Absent a sea change in attitudes toward government, we are unlikely to witness a full-scale revival of Fuller's constitutional philosophy. Nonetheless, I contend that Fuller's tenure as Chief left a lasting imprint on American law and society. Fuller and his colleagues were more receptive to the new realities of American economic life than many of their critics, whose values were often rooted in a pre-industrial world. They envisioned a future based on capitalist enterprise and sought, in the main, to encourage the new industrial order by safeguarding investment capital and national markets. In so doing, the Fuller Court was swimming with the currents of history. It is hardly news that large-scale corporate enterprise has become a permanent feature of American life. Moreover, many Americans remain skeptical about the virtues of the regulatory state. Current deregulation and tax-cutting initiatives reflect continuing interest in free-market ordering. Recently, the Supreme Court has gingerly reaffirmed the notion that the federal government does not possess plenary lawmaking authority.<sup>67</sup> In short, the jurisprudence of the Fuller Court was a better forecast of the future than historians have recognized.

Even more striking has been the return of property rights to the constitutional agenda. In language reminiscent of the Fuller era, jurists and scholars have recently joined in a lively and far-ranging debate over the association between property ownership and a free society.<sup>68</sup> Indeed, many of the issues addressed by the Fuller Court have reemerged as part of the constitutional dialogue.<sup>69</sup> Fuller, who, with the Framers of the Constitution, believed that property and liberty were interdependent, would be right at home.

## Endnotes

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1. Much of the material for this article has been drawn from my book, **The Chief Justiceship of Melville W. Fuller, 1888-1910** (Columbia, S.C.: University of South Carolina Press, 1995). I am grateful to Jon W. Bruce, Barry Friedman, Howard A. Hood, and Nicholas Zeppos for valuable comments.
  2. Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (New York: Macmillan Publishing, 1993), 3.
  3. *Id.*, 389-391; Cass R. Sunstein, **The Partial Constitution** (Cambridge, MA: Harvard University Press, 1993), 45-67.
  4. See generally Richard Hofstadter, **The Progressive Historians** (New York: Alfred A. Knopf, 1968).
  5. *E.g.*, Michael Les Benedict: "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (1985); Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," 61 *Journal of American History* 970 (1975); Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence** (Durham, N.C.: Duke University Press, 1993).
  6. *Harper's Weekly*, May 12, 1888, 340.
  7. See Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism"; Gillman, **The Constitution Besieged**, 33-60; David M. Gold, **The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism** (New York: Greenwood Press, 1990), 137-141.
  8. *Dial*, vol. I (1880), 103.
  9. Ely, **The Chief Justiceship of Melville W. Fuller**, 6-24.
  10. "Correspondence of President Cleveland to Melville W. Fuller, 3 *American Scholar* 245 (1934).
  11. Fuller to Cleveland, January 2, 1893, *Id.* at 248.
  12. Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence, KS: University Press of Kansas, 1997), 260.
  13. G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (New York: Oxford University Press, 1993), 315-318.

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14. Charles Warren, **The Supreme Court in United States History**, rev. ed. (Boston: Little, Brown, 1926), vol. 2, 721.
  15. As quoted in Willard L. King, **Melville Weston Fuller: Chief Justice of the United States, 1888-1910** (New York: Macmillan, 1950, reprint Chicago: University of Chicago Press, 1967), 334.
  16. *Id.*, 339.
  17. Felix Frankfurter, “Chief Justices I Have Known,” 39 *Virginia Law Review* 883, 889 (1953) (observing that Fuller was “not an opinion writer whom you read for literary enjoyment”).
  18. Ely, **The Chief Justiceship of Melville W. Fuller**, 45-47.
  19. As quoted in King, **Melville Weston Fuller**, 149.
  20. Felix Frankfurter, “Chief Justices I Have Known,” 39 *Virginia Law Review* 883, 890 (1953).
  21. *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).
  22. Stephen J. Field, “The Centenary of the Supreme Court,” February 4, 1890, reprinted in 134 U.S. 729, 745.
  23. Fiss, **Troubled Beginnings of the Modern State**, 389.
  24. *See generally*, James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights**, 2<sup>nd</sup> ed. (New York: Oxford University Press, 1998).
  25. Morton J. Horowitz, **The Transformation of American Law, 1870-1960** (New York: Oxford University Press, 1992), 7. *See also* Gillman, **The Constitution Besieged**, 199.
  26. Jennifer Nedelsky, **Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy** (Chicago: University of Chicago Press, 1990), 228.
  27. *E.g.*, *Reagan v. Farmers’ Loan and Trust Co.*, 362, 412, 410 (1894).
  28. *Ex Parte Young*, 209 U.S. 123, 165 (1908).
  29. *Pollock v. Farmers’ Loan and Trust Company*, 157 U.S. 429, 607 (1895) (Field, J., concurring).
  30. Morton Keller, **Affairs of State: Public Life in Late Nineteenth Century America** (Cambridge, MA: Harvard University Press, 1977), 370.
  31. Ely, **The Chief Justiceship of Melville W. Fuller**, 150-171.
  32. *United States v. E.C. Knight Company*, 156 U.S. 1, 16 (1895).

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33. Article I, section 9 of the Constitution provides: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”

34. *Pollock v. Farmers’ Loan and Trust Company*, 157 U.S. 429, 583 (1895).

35. Robert Stanley, **Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913** (New York: Oxford University Press, 1993), 156-165 (discussing states’ rights component of Fuller’s opinions). The income tax was vulnerable on another point as well. A levy on incomes breached the widely accepted constitutional norm that taxes should be equal and uniform. Horwitz, **The Transformation of American Law**, 20-27. For Fuller’s role in the *Pollock* cases, see Ely, **The Chief Justiceship of Melville W. Fuller**, 118-123.

36. Kermit L. Hall, **The Magic Mirror: Law in American History** (New York: Oxford University Press, 1989), 197-202.

37. See generally James W. Ely, Jr., “The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations,” 12 *Great Plains Quarterly* 121 (1992); Richard C. Cortner, **The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment** (Westport, CT: Greenwood Press, 1993).

38. Ely, **The Chief Justiceship of Melville W. Fuller**, 140-148.

39. Richard F. Hamm, **Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920** (Chapel Hill: University of North Carolina Press, 1995), 68-70, 88-91, 176-181.

40. James W. Ely, Jr., “The Fuller Court and Takings Jurisprudence,” 1996 *Journal of Supreme Court History*, vol. II, 120.

41. *Monongahela Navigation Company v. United States*, 148 U.S. 312, 325 (1893).

42. *Id.*, at 326.

43. *Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897).

44. *Id.*, at 235-236.

45. Ely, “The Fuller Court and Takings Jurisprudence,” 127-129.

46. See Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence, KS: University Press of Kansas, 1996), 72-110 (analyzing the key place of contract and property rights in Marshall’s jurisprudence).

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47. *E.g.*, Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993), 174-202; Russell W. Galloway, **Justice for all? The Rich and Poor in Supreme Court History, 1790-1990** (Durham, NC: Carolina Academic Press, 1991), 77-89; Arnold M. Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895** (Ithaca, NY: Cornell University Press, 1960); Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921," 5 *Law and History Review* 249, 250-252 (1987).

48. Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," 1976 *Supreme Court Review* 135, 140-143. *See also* Michael J. Phillips, "How Many Times Was *Lochner*-Era Substantive Due Process Effective?," 48 *Mercer Law Review* 1049 (1997).

49. James Willard Hurst, **Law and the Conditions of Freedom in the Nineteenth-Century United States** (Madison: University of Wisconsin Press, 1956), 10.

50. *Lochner v. New York*, 198 U.S. 45 (1905). *See generally* Paul Kens, **Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence, KS: University Press of Kansas, 1990).

51. *E.g.*, Cass R. Sunstein, "*Lochner*'s Legacy," 87 *Columbia Law Review* 873 (1987); Mary Cornelia Porter, "*Lochner* and Company: Revisionism Revisited," in Ellen Frankel Paul and Howard Dickman, eds., **Liberty, Property, and Government: Constitutional Interpretation Before the New Deal** (Albany: State University of New York Press, 1989), 11-38.

52. Bruce Ackerman, "Levels of Generality in Constitutional Interpretation," 59 *University of Chicago Law Review*, 317, 339-340 (1992).

53. *E.g.*, Bernard H. Siegan, "Rehabilitating *Lochner*," 22 *San Diego Law Review* 453 (1985).

54. *See* Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook 1983 Supreme Court Historical Society* 53.

55. Robert Higgs, **Crisis and Leviathan: Critical Episodes in the Growth of American Government** (New York: Oxford University Press, 1987), 79-105.

56. Veto Message, "Distribution of Seeds," February 16, 1887, *Congressional Record*, 49<sup>th</sup> Cong., 2<sup>nd</sup> Session, vol. 18, pt. II, 1875.

57. Alan Furman Westin, "The Supreme Court, the Populist Movement and the Campaign of 1896," 15 *Journal of Politics* 3, 30-39 (1953).

58. *See* William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937** (Princeton, N.J.: Princeton University Press, 1994), 28 (noting that the "reaction against the decision in *Debs* was primarily confined to the ranks of trade unionists").

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59. “The Last of the Income Tax,” *Washington Post*, May 21, 1895. Indeed, the *Post* opined that “the American people will hold in reverent and grateful memory forever” the names of Fuller and the other members of the majority.

60. The Sixteenth Amendment, authorizing an income tax, was not ratified until 1913. W. Elliot Brownlee, **Federal Taxation in America: A Short History** (Cambridge, MA: Cambridge University Press, 1996), 41-44; Morton Keller, **Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933** (Cambridge, MA: Harvard University Press, 1990) 215-217.

61. Loren P. Beth, **The Development of the American Constitution, 1877-1917** (New York: Harper & Row, 1971), 42.

62. Kens, **Judicial Power and Reform Politics**, 128-129.

63. Charles A. Lofgren, **The Plessy Case: A Legal-Historical Interpretation** (New York: Oxford University Press, 1987), 196-198 (noting that *Plessy* “embodied conventional wisdom”). See also James w. Ely, Jr., “The South, the Supreme Court, and Race Relations, 1890-1965,” in Larry J. Griffin and Don H. Doyle, eds., **The South as an American Problem** (University of Georgia Press, 1995), 126, 127-133 (discussing intellectual climate and political circumstances which fueled the segregationist tide).

64. Stephen A. Siegel, “*Lochner* Era Jurisprudence and the American Constitutional Tradition,” 70 *North Carolina Law Review*, 1, 108 (1991).

65. Herbert Hovenkamp, “The Mind and Heart of Progressive Legal Thought,” 81 *Iowa Law Review* 149, 157 (1995).

66. It has been argued, for example, that Progressive era railroad legislation was ill-considered and severely hurt the rail industry. Albro Martin, **Enterprise Denied: Origins of the Decline of American Railroads, 1897-1917** (New York: Columbia University Press, 1971). Similarly, historians have become increasingly skeptical about the efficacy of Progressive measures to curb trusts, and the Progressive confidence in scientific expertise to resolve social and economic problems. Higgs, **Crisis and Leviathan**, 106-122.

67. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 117 S.Ct. 2365 (1997).

68. E.g., Richard A. Epstein, **Takings: Private Property and the Power of Eminent Domain** (Cambridge, MA: Harvard University Press, 1985); Bernard H. Siegan, **Economic Liberties and the Constitution** (Chicago: University of Chicago Press, 1980); Carol M. Rose, “Property as the Keystone Right?,” 71 *Notre Dame Law Review* 329-366 (1996).

69. Fiss, **Troubled Beginnings of the Modern State**, 394-395 (arguing that the Rehnquist Court, like the Fuller Court, assigns a higher priority to liberty than equality, and views liberty in terms of limited government).