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Mason: The Supreme Court: Palladium: Of Freedom

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RECENT BOOKS

THE SUPREME COURT: PALLADIUM OF FREEDOM. By *Alpheus T. Mason*. Ann Arbor: The University of Michigan Press. 1962. Pp. 207. \$4.95.

What is the *true* view of the Supreme Court and its role in the American system of government? In taking upon itself the ultimate power to decide controversies regarding the meaning and application of the Constitution as the fundamental law, has it acted as usurper or grantee? Is it essentially an instrument of democracy and popular self-government or of oligarchy and minority rule? As expounder and enforcer of the great principle of limited government under law, is it the Vehicle of Revealed Truth, the Nation's Conscience, our Palladium of Freedom, Democracy's Indispensable Crutch, or merely one of a number of Power Groups in a wonderfully contrived system of checks and balances?

These and other related questions make up the subject under inquiry in this notable study by Professor Mason,¹ one of the nation's outstanding authorities on the Supreme Court and its works.² The book is an expansion of the William W. Cook Lectures delivered in the Spring of 1962 at The University of Michigan. As may be inferred from the title, the central thesis is a defense and justification of the institution of judicial review. The summarizing conclusion (p. 178) is:

"By protecting the integrity and unimpeded operation of the entire process by which majorities are formed, judicial review becomes a surrogate for revolution and contributes positively to the preservation of democracy. . . .

"The Court is the palladium of free government. Its decisions, based on reason and authority, have a moral force far exceeding that of the purse or sword. . . . The Justices inform by both precept and example. They make vocal and audible the ideals and values that might otherwise be silenced. Far from discouraging civic responsibility, judicial decisions and Supreme Court opinions are among the greatest educational forces in America. In passing judgment on living issues, in resolving complexities which are at any given moment puzzling and dividing us, it teaches the demanding lesson of free government."

Before he arrives at this conclusion, Professor Mason ranges over a wide sweep of American political experience. In his introductory chapter, entitled "Political System Without a Model," he surveys the formation of

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² Some of Professor Mason's other books on the Supreme Court are: *BRANDEIS, A FREE MAN'S LIFE* (1946); *THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP 1930-1937* (1953); *AMERICAN CONSTITUTIONAL LAW, INTRODUCTORY ESSAYS AND SELECTED CASES* (1954) [co-author with Beane]; *SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE* (1955); *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956); *THE SUPREME COURT FROM TAFT TO WARREN* (1958); *THE SUPREME COURT IN A FREE SOCIETY* (1959) [co-author with Beane].

the Constitution. He views the Constitution as a logical culmination of one continuous revolutionary movement which began with the enunciation of a philosophy of government new to the world in the Declaration of Independence. Adoption of the Constitution amounted to a peaceful revolution directed toward an alteration of a loose confederation of states into an organic whole, founded upon the idea of popular government held in restraint under a built-in system of checks upon majority rule. Inclusion of a feasible amending procedure, coupled with a Bill of Rights subsequently added to insure more specifically toleration of dissent and expression of minority views, provided mechanisms by which further peaceful changes might be effected as circumstance warranted. In the eyes of the founding fathers, these arrangements would preclude, so far as it was humanly possible to do so, the need to resort to violent revolution as a method of change in the future.

In his third chapter, entitled "Cementing the Keystone," Professor Mason reviews the events leading up to establishment of judicial review as a part of the constitutional plan. His well-documented, carefully-reasoned conclusion is that judicial review was not only intended and expected by the framers to become an element in the plan of government, but that it was a logical, essential feature of the system. Two chapters follow in which he analyzes two periods of history during which, in the view of its critics—Jefferson during the era of the Marshall Court and F. D. Roosevelt during the regime of Mr. Chief Justice Hughes—judicial review was allegedly perverted into judicial supremacy. The final chapter examines the functioning of the Court in the area of its greatest concern since 1937, the maintenance of civil liberties and equality of treatment under the law.

One can not fail to be impressed by the profound erudition, felicity of style, and penetrating insight displayed by the author. His discourse is an intellectual feast fully measuring up in quality to the kind his previous writings in this area of scholarly inquiry have taught his readers to expect. As one who is generally in accord with his conclusions and evaluations as a whole, this reviewer finds it somewhat difficult to point to any matters upon which to take issue. Yet there is one point regarding which, in the reviewer's judgment, the author betrays a certain cloudiness of view. His is a point of view which characterizes the writings of a great many commentators of "liberal" outlook on the work of the Supreme Court in recent years, some of whom were extremely critical of the operation of the system of judicial review before the "Constitutional Revolution" of the 1930's. Introducing the second half of his discourse, the author raises the question, "Can a line of demarcation be maintained between judicial review and judicial supremacy?" (p. 91) This, he concedes, is "a problem of which its framers were acutely aware" and one which "is still troubling the Court and its critics more than a century and a half later." (p. 92) This, of course, is the central issue posed by the Supreme Court's having been accorded the role it has in the American scheme of government. The

author, it is evident from the structure of his discourse, appears to believe such a distinction can validly be drawn. In the judgment of this reviewer, the realistic answer that must be given to this question is "No!"

To refuse to make such a distinction does not necessarily imply on the one hand a condemnation of judicial review as a feature of the American system of government nor on the other an acceptance of every pronouncement of the Supreme Court as "revealed truth" concerning the meaning of the Constitution. To attempt to draw a valid distinction between a *proper* exercise of the judicial veto on constitutional grounds ("judicial review") and an *abuse* of that power ("judicial supremacy") is to chase after a will-o'-the-wisp. It leads inevitably into the morass of an unrealistic, mechanistic conception of judicial review; into the habit of characterizing this decision as "good law" and that one as "bad law," this decision as "soundly in line with precedent" and that one as "capricious," this decision as being "in accordance with the intent of the framers" and that one as "judicial amendment of the Constitution in disguise," this decision as "in accord with the spirit of the Constitution" and that one as "a departure from sound constitutional principles," and so on. However appropriate such characterizations of the Court's rulings may be if one views the Court simply as the highest court of law in the land, they have little or no validity in connection with its performance of its greatest function, that of giving concrete form and substance to the cryptic authorizing and limiting clauses which outline our constitutional plan. In this area judicial pronouncements on close issues necessarily involve a high degree of exercise of will and choice rather than judgment, of applied political philosophy rather than legal *expertise*. If one accepts the principle of according the "awful" power to the Supreme Court to disallow national and state governmental actions on the ground that they conflict with immutable principles incorporated in the Constitution, one has committed himself to the principle of accepting as equally valid, at least until they can be altered by one means or another, the "bad" rulings of the Court as well as the "good."

One must assume that the Justices who comprise the Court from time to time are equally sincere and devoted to the cause of maintaining unimpaired the principles of the Constitution as they perceive them. As the author points out, Mr. Justice Peckham's enshrinement of *laissez faire* doctrine as a principle of constitutional law was an attempt to apply a kind of "preferred freedom doctrine of economic rights." (p. 119) Who can say his efforts to this end and those of his like-minded confreres on the bench were any more exercises in "judicial supremacy" than those of Justices Black and Douglas later in advocating acceptance of a "preferred freedoms" doctrine in the area of civil liberties? Mr. Justice Peckham's unbounded confidence that "economic man," if allowed freedom from governmental restraints to pursue his material interests in the competition of the market place, would advance not only his own but the public interest to the maximum was in time found through economic science to have been in some mea-

sure misplaced, and was eventually adjudged unworthy of being dignified as sound constitutional doctrine. In view of new knowledge now being uncovered by social psychologists and other species of social scientists casting doubt on the validity of the theory that man is a "rational animal" governed wholly by reason in his political and social behavior, who can say that the idea of complete reliance on untrammelled "competition in the market place of ideas" to reveal truth and induce its acceptance may not likewise be found to be properly subject to some measure of qualification also?

In short, in accepting the principle of judicial review one must also be prepared to accept the fact that it simply means elevating the Court, for good or ill, to the position of a "power group" in the governmental process. As one must do in making a judgment on the propriety of the Senate's maintaining a system of rules of debate which permit a minority to prevent majority action, one must weigh the possibilities for what he deems good against the possibilities for what he deems evil in such a system and accept the consequences of his judgment. In political affairs there is no power that can be used only for "good" ends; and this includes the power of judicial review.

To pursue this thought further, one may question the propriety of awarding to the Supreme Court the unqualified accolade given it in the subtitle: "Palladium of Freedom." It is true, of course, that in the last two or three decades the Supreme Court has made noteworthy contributions in advancing the cause of civil liberties, raising the standards of administration of criminal justice, striking down the barriers of racial discrimination, and enlightening the American people on the principles and ideals by which a truly democratic society must be guided. Its use of its power toward these ends has produced a remarkable reaction in popular attitudes toward the Court and toward the institution of judicial review. Many erstwhile critics have been converted into ardent defenders of this feature of our governmental system; many erstwhile defenders have been converted into critics. However, in this reviewer's opinion, to bestow this encomium upon the Court, without qualification, is to overlook several aspects of the matter. In the first place, the Court has chosen to emphasize its role of champion of civil rights and liberties only comparatively recently. One may well ask, Where was the Supreme Court when those who perceived the incompatibility of slavery with free government were attempting to restrict its spread and bring about its elimination? Where was the Court when the fourteenth and fifteenth amendments, designed to insure equality under the law to the newly-emancipated Negro, were in effect rendered into dead letters for three-quarters of a century?

Again, one may point out that such terms as "freedom" and "rights of minorities" are very tricky words indeed. As Lincoln pointed out in his story about the shepherd and the wolf, what is freedom for the one may well be regarded as an oppression by the other. One has only to call to

mind the violently opposed remarks and reactions to the recent events at Oxford, Mississippi, to remind himself of this fact. The term "minority" likewise is slippery in that it has relevance only within a particularly defined context. The pro-segregationist white people of the state of Mississippi are a minority with reference to the people of the United States as a whole. The colored population of the state of Mississippi is a minority with reference to the state's white population. Which minority is the Court obligated to protect against the majority's will? So far as the Supreme Court's functioning as a protector of minorities is concerned, for that matter, its recent decision in *Baker v. Carr*³ will no doubt prove to have been a master stroke in protecting political freedom for urban *majorities*, as against their oppressors, the rural *minorities*. Judicial review can as well and properly be employed to protect the interests of a majority held in thrall by a minority as the other way around. It does not have to be confined in its use to protection of the underdog. It also has its uses in "legitimizing" majority rule and in vindicating authority to govern.

These comments by way of criticism of Professor Mason's work are, concededly, somewhat on the cavilling side. He has presented a very closely-reasoned, compelling case for maintaining unimpaired our present system of judicial review and for an "activist-minded" Supreme Court where protection of minority rights and interests is concerned. He has made a distinct contribution to better understanding and appreciation of this feature of our governmental institutions.

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³ 369 U.S. 186 (1962).