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THE SUPREME COURT FROM TAFT TO WARREN, by Alpheus Thomas Mason. Louisiana State University Press, Baton Rouge, 1958. $4.95.

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government by all those who so believe; it means merely that democracy must be regarded by them as subject to the rule of the sciences of order for man, or, in other words, as an instrument of order rather than its generative source.

*Robert A. Pascal**

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After some twenty years of relative obscurity vis-a-vis Congress and the President, the Supreme Court is once again in the public eye. It is the object of mordant denunciation and enthusiastic praise, but much that is written by both defenders and detractors is little more than rampant emotionalism which sheds little light on the Court's processes or its role in the American system. Professor Alpheus Mason, one of America's foremost authorities on the Supreme Court, has produced a splendid little book which ought to dispel much of the mythology abroad in the land.

Mr. Mason contends that in order to understand what the Supreme Court *is* and what it *does*, we must first rid ourselves of the fictitious notion that the Court is a non-political institution. Mr. Mason's assertion that the Court makes policy is difficult to gainsay. It has done so ever since the days of John Marshall, and the desegregation decisions, for example, are no different in kind than hundreds of other "policy" decisions made by the Court in the past century and a half. But, asks Professor Mason, is not an appointive body which is exercising political control in a supposedly democratic system an "alien offshoot"? Not at all. The great problem in a democratic polity, says Mason, is to "protect individuals and minorities without thereby destroying capacity in the majority to govern." In exercising judicial review the Court guarantees to minorities access to the political process, and in so doing, it "implements rather than limits free government." Since majorities are always in a fluid state, changing both in composition and in goals, the political rights of minorities become the "very foundation" of majority rule. The Supreme Court in a political sense is corrective in nature;

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it does not determine in advance what decisions can be made by political processes. Furthermore, Mr. Mason argues, judicial activism in the area of political and civil liberties is perfectly consistent with judicial restraint in economic matters. I would agree with the author that this is sound constitutional theory. The Constitution, after all, is silent on the matter of economic arrangements and espouses no particular economic doctrine; but it is unequivocal in its restraints in behalf of individual freedom. If one accepts this view, it follows that the anti-New Deal Court of the 1930's was frustrating the democratic process, whereas the Warren Court is properly preserving its integrity.

Once we understand the true function of the Court it is not enough to study its decisions. We must, suggests Mr. Mason, study the men who made them. And this the author does with objectivity, balance, and acumen. Chief Justice Taft is portrayed as a man who "loathed politics and usually bungled it," but whose "relish for power was great." He was attracted to the Chief Justiceship because it bestowed power and dignity without worry, and under his leadership the judiciary became a "super-legislature." Taft disliked the give and take of free discussion, distrusted dissenters, and even attributed evil motives to those who differed with him on constitutional issues. His primary goal was stability — both in society and in judicial decision — but unlike some of his judicial brethren he recognized the political function of the Court and did not attempt to gloss it over by invoking the "mechanical, slot-machine" theory of judicial interpretation. Although ruthless in using the Fourteenth Amendment to veto laws interfering with property, Taft, in many instances, led the Court in sustaining federal regulatory legislation. Mr. Mason suggests that Taft's Chief Justiceship "might have been constructive, but for his haunting fear of progressivism," a fear which motivated him to wield power in behalf of the dogma of laissez-faire, a dogma which America had long since rendered obsolete.

Unlike Taft, Charles Evans Hughes "seemed unduly interested in preserving the Court's symbolic function" at the expense of both the form and substance of the law. Hughes, of course, was Chief Justice during one of the most critical periods in the Court's history, and his enigmatic constitutional ambivalance was in part responsible both for the crisis as well as for its termination. Mason points out that many of Hughes' opinions

were so filled with subtleties and equivocation that even the most discerning observers could not penetrate the "judicial smoke-screen." Students of the Court confused his dissenting opinions with his concurrences to the point that some writers depicted Hughes as being perfectly consistent throughout his judicial career. According to Mason, however, Hughes (and Roberts) "beat a retreat" in order to sanction a constitutional transformation which, in terms of speed and execution was "unprecedented in the annals of the Supreme Court." Hughes can be better characterized, therefore, as a master political strategist and it was in this role that he closely resembled Marshall.

Harlan Fiske Stone was appointed to the Supreme Court in 1925, serving under both Taft and Hughes before President Roosevelt elevated him to the Chief Justiceship. During the judicial regimes of both Taft and Hughes, Stone differed from his colleagues on the Right who wrote their economic predilections into constitutional law. As Chief Justice he was at odds with his brethren on the Left who furthered political preference through judicial opinion. Stone was, in Mason's view, a moderate, a conscientious practitioner of judicial self-restraint. Admitting that a judge's personal preference inevitably enters the law, Stone urged restraint to tame subjectivity, not to eliminate it. Stone was the man who, in both the old and the new Court, carried the precepts of Holmes and Brandeis to fulfillment. "Though an habitual Republican, Stone knew that increased use of government power is a necessary concomitant of twentieth century conditions." Although Stone's Court was one of the most openly quarrelsome in history, the author rates Stone above Hughes and Taft; in fact describes him as "one of the great creative judges of our time." Unanimity on the Court is not necessarily a wise criterion for judging the effectiveness of the Chief Justice or for evaluating the work of the Court. Mr. Mason reminds us that the Court through its learned debates on the great constitutional questions renders an inestimable service in educating the public. I believe that this educational function of the Supreme Court, often overlooked by the Court's critics, deserves the emphasis which the author gives to it. Dissenting opinions are not merely constitutional chaff, and a divided court is not the enemy of stability. Constitutional growth is, after all, the result of disagreement, and this is as it should be in any free society.

In addition to the penetrating vignettes of Taft, Hughes, and

Stone the book is sprinkled throughout with keen analyses of the personal and judicial philosophies of other Justices past and present. This is responsible, able, and thorough scholarship at its best. What's more, it is lively and engrossing reading for lawyer and layman alike.

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