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## Law and Politics in the Supreme Court, by Martin Shapiro

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LAW AND POLITICS IN THE SUPREME COURT. By Martin Shapiro.  
New York: The Free Press of Glencoe. 1964. Pp. 364. \$6.95.

Students of Supreme Court decisions often ponder over the following type of questions: Are Supreme Court Justices, in arriving at their deci-

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11. *Id.* at 260.

12. *Id.* at 302. In the May 29, 1962, issue of U.S. NEWS & WORLD REPORTS, at page 51, Chief Thomas Cahill of the San Francisco Police is quoted as saying, "The crime rate here went up 17 percent last year. This is partly because of stricter interpretation of the laws, and the new decisions on search and seizure and arrest. Individuals who were subjected to vagrancy arrest or to being questioned now feel more secure. There was a time when those suspicious individuals were locked up for vagrancy. Now you have to have something definite on them."

13. LA FAVE, *op. cit.* *supra* note 2, at 381.

14. *Id.* at 300-318.

15. *Mapp v. Ohio*, 367 U.S. 644 (1961).

16. *Wong Sun v. United States*, 371 U.S. 471 (1963).

17. 378 U.S. 478 (1964).

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sion in each case, guided by the contents of the norms of conduct *inter se* the parties before the Court or do they arrive at their result to satisfy the demands of the brand of federalism then enjoying the favor of a majority of the bench? When the Court hands down a decision involving the duties and obligations of management and labor under a collective bargaining agreement did it arrive at its conclusion because of contract law, the demands of the pertinent statutes or its notion of which branch of government should be charged with the prime responsibility of determining matters involving labor relations? Are certain tax questions left unresolved by the Court simply because it believes that the tax laws can best be enforced by permitting particular issues to be determined by the Internal Revenue Service? These are the kind of questions examined by Dr. Martin Shapiro in *Law and Politics in the Supreme Court*.

Dr. Shapiro depicts the nation's highest tribunal as a political body, in the non-derogatory sense of the term. In *Law and Politics*, politics refers to a technique of distributing power under our federal system of government. Shapiro sees the Supreme Court deciding cases repeatedly on the basis of the answer to the question: Which branch of the government should have the power to act in this area? In some cases, the fact that the Court's decision is based on a desired diffusion of the power to govern under our Constitution is exceedingly obvious—certainly in retrospect. Is there any doubt why the Supreme Court arrived at the result it did in such cases as *Marbury v. Madison*<sup>1</sup> and *Baker v. Carr*?<sup>2</sup> But was it equally as clear that the Court was effecting a realignment of power when it decided *Thompson v. City of Louisville*<sup>3</sup> and *Fay v. Noia*?<sup>4</sup> In these latter two cases, as in the former ones, the Supreme Court was, on final analysis, deciding which segment of government should have the power to prescribe the enforceable standards of human conduct in reference to certain areas of action. Both of the latter cases in effect took power once vested in state governments and transferred it to the federal government.

In many instances, the heat of the controversy, the terms used by the Court in its opinion, and the arguments of counsel have clouded what may have been the really determinative factors of the case. For instance, an opinion of the Court that seems to be simply a statement of the meaning of the Sherman Act may when carefully scrutinized be an assertion by the Court that henceforth it will exercise the power to shape the

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1. 5 U.S. (1 Cranch) 137 (1803).

2. 369 U.S. 186 (1962).

3. 362 U.S. 199 (1960).

4. 372 U.S. 391 (1963).

future pattern of the development of American enterprise.<sup>5</sup> With the passage of time, with the relentless digging and probing of the activities of the Supreme Court by legal scholars, with the analysis and the re-analysis which is constantly occurring, and the unabated concern with the import of the Court's decisions and the demands of our legal system, an opinion rendered by the Supreme Court over the course of years frequently takes on a meaning quite different from the one initially announced.

Dr. Shapiro is a political scientist, who views the Supreme Court as only one of the many instrumentalities of government which is invoked to promote the attainment of certain societal goals. His approach is readily distinguishable from that of the practicing attorney. Lawyers ordinarily focus their attention on the impact of the decisions handed down by the Court in terms of the effect of the Court's action upon the litigants and those who may be similarly situated.<sup>6</sup> Dr. Shapiro views the Court in a different perspective. He looks upon it as but one of the actors in the milieu of human activity and man-made institutions. He is concerned with the manner in which the Court carries out its role as an organ of government. Consistent with one of the current-day tenets of the discipline in which he was trained and which he teaches, Dr. Shapiro relegates to a secondary position the role of the Supreme Court as a tribunal determining the rights and duties of those who appear before it and enunciating a final interpretation of the Constitution.

As seen by Shapiro, the Supreme Court is a body which acts as a unit, playing an assigned part in administering the affairs of the nation. He stresses the importance of trends and patterns which appear in the Court's opinions instead of the results arrived at in individual cases. He rejects the concept that the Court is unique—he insists it is just another one of the agents of government. In his opinion, the Court is too frequently viewed as just a court of law. He believes that the emphasis which has been placed on the significance of the Court's decisions dealing with the mandates of the Constitution is unwarranted. When the Court

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5. This kind of policy-making by the Supreme Court clearly appears in the stringent standard that body has been invoking in the 1960's in regard to the validity of mergers. The Court has patently espoused an arithmetic test of permissibility of combinations rather than an economically-oriented one. A comparison of the majority opinion in *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1963) and the position taken by the incumbent Chief of the Antitrust Division of the Justice Department in his article, Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313 (1965) points up the difference between the "numbers" and "economics" standard of legality.

6. The manner in which lawyers and political scientists may band together to enhance one another's expertise is explored in LASSWELL, *THE FUTURE OF POLITICAL SCIENCE* 193-206 (1963).

acts or refrains from acting, when it decides in favor of a plaintiff or a defendant, Dr. Shapiro sees it acting primarily as a policy-making body and only secondarily as a judge of the rights and the obligations of those who have appeared before it.

Do Supreme Court Justices merely find the law? Are they neutral, disinterested persons, devoid of personal prejudices, biases and standards of propriety who, to resolve a law suit simply go to the books to find pertinent principles of law upon which to predicate their decision? No, answers Shapiro. He looks askance at the concept that there is such a thing as "law" which is ever-present, immutable, and always readily available to be applied by the judges.

The idea of "judicial self-restraint," long urged by Frankfurter, is in Shapiro's opinion unrealistic.<sup>7</sup> He believes that inaction, like action, in areas subject to judicial power shapes policy. Refusal to act, such as denying certiorari or declining to review a finding of an administrative agency, according to Shapiro, results in the formulation of policy. Although an answer may be negative in nature, to the author it is still policy-making. He insists that judges are obliged to pick and choose; and since they must select between alternatives, they cannot insulate their decision-making process from their personal sense of values.

Stressing the Court's role as a policy-making body, Shapiro asserts that the Justices, seeking to insure the adoption of the policies which they favor, must actively woo the support of various sectors of the community. To promote acceptance of their own standards they must court the favor of others including lower court judges (state as well as federal), those who administer the laws, various pressure groups, and on final analysis, the public.<sup>8</sup> While the Justices may possess the power to establish doctrine, they must recognize that their mandates are not self-enforcing. By responding to the demands of those whose aid they require to execute their pronouncements, asserts Shapiro, they often formulate policies and decide cases in a manner calculated to advance their favor-gaining objective. The author contends that on occasion the Court holds in abeyance its ultimate aspirations and policies and shapes its current decisions with an eye toward how a decision will be received by those whose approval they solicit. In such instances, the merits of the parties' contentions and the Justices' personal appraisals are subordinated to the response which they anticipate will be forth-coming from those they wish

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7. Frankfurter's philosophy of federalism is discussed in MENDELSON, FELIX FRANKFURTER 68-108 (1964).

8. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964) specifically deals with the techniques employed by Supreme Court Justices to promote the acceptance of their individual theories of right and wrong.

to please. Foreseeing displeasure on the part of their "constituents," Shapiro asserts, the Court may be deterred from arriving at a decision it might otherwise have reached. This portion of Shapiro's thesis brings the Court at least to the brink of "politics," in its popular sense. Shapiro does not make a value judgment on this aspect of the Court's conduct. One trained in the law, however, is prompted to ask: While such conduct in the context of a representative form of government might be appropriate for members of the legislative branch of the government, and on occasion excusable if pursued by the executive, is it in the best interests of the nation for the Supreme Court to be so dependent on the wishes of the community? Then again, is Shapiro's assertion in this area correct? A Court which arrives at its decisions on an *ad hoc* basis, with the jurists conducting themselves as participants in a popularity contest, certainly jeopardizes its own integrity if not its very existence. Hopefully, and the facts seem to bear this out, this motivating factor examined by Shapiro has been, and will remain, in most cases in the very distant background.<sup>9</sup>

Studying the significance of the general instead of the specific, Shapiro examines the following five divisions of the Court's work: (1) *Judicial Review of Congressional Investigations*. Here, as seen by the author, the Court is confronted with the dilemma of balancing the Constitutional command that the Congress is the branch of the federal government charged with enacting legislation and Constitutional mandates that individuals who are summoned to appear before Congressional Committees are to be protected from certain kinds of conduct. While the Congress must be afforded the broadest of latitude in conducting investigations so that it can formulate essential legislation, the Constitutional protections of the individual must be preserved. Shapiro finds that the Court has failed to accommodate satisfactorily these sometimes conflicting objectives. He concludes that ordinarily the Court adheres to a hands-off policy in regard to Congressional investigations. Condemning the Court-created presumption of the propriety of Congressional investigations, he calls for a re-evaluation of the Court's policy in this sector with a view to expansion of the rights of individuals who appear before Congressional Committees. (2) *Labor Relations*. Shapiro describes the Court's thinking in this area as muddled. He maintains that in disposing of labor cases the Court incomprehensibly vacillates between Constitutional and statutory grounds as the basis of its decisions. The Court's practice of abstaining in most instances from interfering with

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9. The Court's decisions within the last decade in reference to civil rights and the rights of an accused in a criminal proceeding tend to discredit this portion of Dr. Shapiro's thesis.

findings of fact made by the National Labor Relations Board is viewed as compensating the Board for the Court's seizure of the power to formulate basic labor policy. By usually favoring the Board over state efforts directed at regulating labor relations, Shapiro urges that the Court is simply "harmonizing" its working relationship with the Board. The devices of pre-emption and primary-jurisdiction are depicted by the author as merely tools employed by the Court to secure the necessary support for the role it has chosen for itself in this sector. (3) *Taxation*. Congress, the Internal Revenue Service and the Supreme Court are pictured by Shapiro as joint adventurers in making and administering the laws aimed at raising revenue. The author suggests that the Court's decisions in tax cases are frequently designed to avoid over-involvement. Shapiro writes that for the most part the Court looks to the Internal Revenue Service for guidance instead of formulating its own guide-lines. The rules created by the Court are supposed to aid in playing a passive, deferential, and non-policy making role in tax matters. According to Shapiro, the very complexity of some aspects of the tax laws has contributed to the Court's disinclination to enlarge the breadth of its activities in this area. He contends that this propensity to avoid policy-making in regard to taxation should, if not completely halted, be modified. (4) *One Man, One Vote*. Exploring *Baker v. Carr* and its progeny, the author obviously feels more at home than anywhere else in the book. The Court's rejection of the principle that representation in the legislature is a political rather than a judicial matter, is regarded by Shapiro as indicative of the Court's assumption of the role of political theorist as well as political scientist. By undertaking to alter an established concept and leaping into a readily avoidable struggle fraught with danger, the members of the Court manifested that they not only possessed deep-rooted personal convictions as to the theory of American government but also the desire to put their beliefs into practice. The author states that the Court's position is consistent with the current consensus. Its action is characterized as illustrative of its role as "the crusading political philosopher of populism." Although he expresses doubt that the Court's efforts will ultimately meet with success, Shapiro commends its attempt to promote political equality. (5) *Antitrust*. It is generally agreed that by the late 1930's the Supreme Court had for the most part surrendered its role as the interpreter of the commands of the Constitution relating to the kind of economy ordained by the founding fathers. Within the last decade, however, the Court has repeatedly been called upon to decide questions pertaining to the nation's economic structure. This recent activity is not based on the Constitution but upon the economic negativist policies laid down by the Congress in the antitrust laws. The wide dis-

cretion of the Court in administering the commands of the Congress is attributed in *Law and Politics* to the form of the statutes containing that body's stated economic policy for the nation. Burdened with promoting what Shapiro regards as an unrealistic economic policy, the Court has tended to use a *per se* statistical standard of legality. In this fashion it has been able to avoid coming to grips with fundamental economic theory and environment factors which in particular instances call for Court-innovated exceptions to general rules of propriety. Dr. Shapiro's lengthy discourse on the extent and breadth of anticompetitive pressures which are present in the nation's economy is especially worthwhile reading. He emphasizes the seriousness of the cleavage between the "is" and the "ought" and the hazards inherent in confusing the two. Since definitive standards are lacking, the author finds that in general when dealing with antitrust cases the Court pays prime attention to the results desired in particular cases instead of precedent. Such a procedure has understandably given rise to inconsistency, instability, constant change, and widespread dissatisfaction with our antitrust laws by members of the business community.<sup>10</sup> Shapiro, like others who have studied our antitrust law, calls for a reappraisal of Court policy in this area.

Most lawyers would certainly take issue with the author's failure to recognize fully the adversary nature of the proceedings conducted in the Supreme Court. In the eyes of one trained in the law, Dr. Shapiro clearly misses the mark when he pictures the lawyers as one of the several pressure groups which have ready access to the Court. He fails to recognize that lawyers who appear as such before that body act as advocates, as agents for their clients, and therefore as lawyers of necessity in most cases they are required to take opposing positions. Dissimilarity of contentions is not one of the characteristics of a pressure group. The striving for victory, with the sense of accomplishment cherished by most lawyers, is not referred to in *Law and Politics*. Certain to displease many lawyers is Shapiro's insistence that the Court fails to analyze methodically the actual issues in the cases upon which it must pass judgment.

*Law and Politics* is full of novel ideas and seldom-stated theories of the judicial process. It is certain to raise many eyebrows. It may be that some of Dr. Shapiro's contentions cannot stand the light of day, because he neglected to give sufficient weight to traditional legal considerations or discarded those considerations too summarily from his thinking. Nonetheless, with this corrective in mind, Dr. Shapiro's offering is well worth sampling.

DR. EDWIN W. TUCKER †

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10. PHILLIPS, PERSPECTIVES ON ANTITRUST POLICY (1965) contains a series of critical essays of the Court's policies in this segment of the law.

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