

dinary scholarship which went into this book cannot be denied, and the book may well be considered an important contribution to the science of international law.

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LAW AND POLITICS IN THE SUPREME COURT. By Martin Shapiro. New York: The Free Press of Glencoe. 1964. Pp. 378. \$6.95.

Political scientists for some time were content to point out that in reality the Supreme Court legislates, rather than finds, law. Then, impatient with the dichotomy between their happily discovered reality and what the Supreme Court seemed to think it was doing, these students of the Court claimed that it should drop its pretenses and frankly recognize that it is a political body intent upon maximizing its power by inventing law. Now Professor Martin Shapiro, in *Law and Politics in the Supreme Court*, suggests that if the Supreme Court takes this advice it will *do a better job*.

The thesis is an intriguing one and deserves consideration at this point in the development of Supreme Court studies. To demonstrate his thesis, Professor Shapiro chooses areas of Supreme Court decision-making, some of which are well off the beaten constitutional track:¹ labor law, taxes, antitrust, Congressional investigations, and apportionment. Primarily because of space limitations only the latter two will be examined here.²

In the area of Congressional investigations, Professor Shapiro finds that the Supreme Court has "failed as a political scientist, that is, has failed to arrive

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¹ However, it is difficult to claim that in the usual constitutional law case the Court would do a better job if it recognized its legislative role and acted on the basis of frank power considerations, particularly if a job well done includes having the decision obeyed by society. The school segregation cases of 1954 are in point; notions of political science or political realism probably led Justice Frankfurter to introduce the concept of compliance "with all deliberate speed." Yet this concept arguably was in part responsible for the extremely slow or nonexistent pace of desegregation in the Deep South in the decade after 1954, since it gave to the school segregation cases a frankly legislative tone. More popular respect might have been engendered by a clearly judicial determination that school segregation was wrong and unjust and should be immediately terminated. Such a decision in practice would necessarily have to be implemented gradually (which the Supreme Court could recognize in a series of *per curiams*), but at least there would have been strong moral compulsion to overcome Southern inertia of taking no steps to comply. On the other hand, one cannot be certain, in retrospect, that a clearly judicial determination might not have met with flagrant, defiant violation which, as Justice Frankfurter argued, could have undermined completely the Court's authority.

² Labor and antitrust law as handled by Professor Shapiro certainly show the Court in a legislative or quasi-legislative posture, but it is difficult, given the legislative histories of some of the major labor and antitrust laws, to see how the Court could have acted otherwise. Congress to a large extent has delegated legislative powers to the Court in these areas. As for tax law, its reluctant scrutiny of tax codes reveals the Court in a minor role of creating usually short-lived harmony between the Tax Court and the circuit courts.

at a realistic vision of the nature and function" of investigations.³ He asserts that the Court has looked only for legislative purpose in these cases, a one-dimensional view which has obscured a more realistic approach, when clearly there are other "purposes" behind investigations—for instance, "exposure for exposure's sake."⁴ If the Court would only acknowledge the reality of the exposure motive, says Shapiro, it "would be free actually to look at Congressional exposure and to determine whether or not, in specific instances, it has invaded the Constitutionally guaranteed freedoms of specific individuals."⁵ Then it would be possible to change the traditional weights in the "balancing test" of governmental power against individual first amendment freedoms. The traditional test, Professor Shapiro notes, "always begins by throwing the whole law-making power of Congress, particularly the power to legislate in the interest of national security, on one side of the scale . . ."⁶ This clearly outweighs the "individual rights invaded by investigation."⁷ But the interest of "exposure" on the government side of the scale would appear to be of much lighter weight. By substituting "exposure" for "legislative purpose," the Court could "begin to act as a real balancer of interests, striking down those inquiries that needlessly invade Constitutional liberties and upholding those in which exposure of some danger or misdeed is essential to our society."⁸

Professor Shapiro's argument is helpful to the political scientist who wants to analyze the behavior of the Court and consider what it might do, but in practice this balancing might not be possible. The idea of "balancing" interests is still relatively new to Supreme Court jurisprudence and its ramifications are probably much more complex than is generally realized. For one thing, if a balancing test is to be at all meaningful, and Professor Shapiro assumes that it is, it must mean that *competing* interests are to be weighed by the Court of last resort. For example, on the government side of the scale one might place the interest of Congress in informing itself as to matters which might be the appropriate subjects of future legislation in the national interest—*e.g.*, the "legislative purpose" test which Professor Shapiro has with reason criticized as having been unproductive up to now, but which could still be rescued and applied meaningfully.⁹ On the individual side may be placed the interest of privacy—freedom to pursue political life, intellectual liberty, and social happiness without official inquiry.¹⁰ These interests obviously compete with each other, but at least can be resolved in any given case by looking at the degree of relevance of the specific inquiry to ultimate legislation as compared to the degree of invasion of the individual's privacy. However, it would seem that *contradictory* interests, unlike competing interests, cannot be "balanced" in this sense. To say, for instance, that a Court can balance a man's right to remove an adverse possessor from his

³ SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 50 (1964) [hereinafter cited as SHAPIRO].

⁴ *Id.* at 69.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Id.* at 70.

⁹ See, *e.g.*, *Watkins v. United States*, 354 U.S. 178 (1957).

¹⁰ For a brief discussion of the constitutional force behind the "right of privacy," see Frantz, Book Review, 52 CALIF. L. REV. 690 (1964).

land against the adverse possessor's right to stay on the land is merely to open the door to unfettered judicial discretion in the infinite no-man's-land between these two contradictory alternatives. The same seems to be true of Professor Shapiro's articulation of "exposure for exposure's sake" as an "interest" of Congressional investigations.¹¹ The Court would be asked to weigh Congressional interest in exposure against an individual's right to privacy, interests which flatly contradict each other and which invite the Court to engage in discretionary scale-tipping. In short, contradictory interests are merely the same interest viewed positively, negatively or any shade in between. A meaningful "balancing test" requires that the interests weighed be sufficiently different from each other—although competing with each other for priority—so that rational decision-making can result. Absent this qualification, it might be impossible for witnesses as well as Congressional investigating committees to have any idea of when "exposure" becomes legally excessive. Moreover, respect for the Supreme Court as a legal arbiter might diminish despite its possible acclamation as a "political scientist."

Professor Shapiro, as has been noted, would substitute "exposure" for "legislative purpose" as a "weight" on the governmental side of the scale in order to let the Court do a better job in restricting the scope of Congressional investigations. It is, however, equally possible to consider ways of increasing the Court's attention to the individual's side of the scale and accomplish the same result while leaving the entire enterprise within the realm of predictable law. In a seminal article not cited by Professor Shapiro, Professor Charles Fried argues cogently that there has been a tendency in Congressional investigation cases to articulate the individual's interests in privacy on the highly particularistic basis of wants or desires, whereas the competing Congressional interest is couched in general terms such as the protection of national security from Communist subversion.¹² But the Court might be persuaded to view the individual's claim as the "assertion of an interest which can be understood only as a reference to systematic ways of doing things, to roles, institutions and practices."¹³ First amendment freedoms are not "charters for anarchy;"¹⁴ they have a definite communal purpose—*e.g.*, the search for truth in a marketplace of ideas protected by freedom of speech and association. A recognition that these broader purposes are necessarily attached in a specific case to the individual witness' assertion of freedom *not* to speak may bring about a result approaching that desired by Professor Shapiro without a substitution of weights on the balance. It might also be, in fact, an easier and more natural change for the Court to make.

¹¹ Of course to the extent that motives other than "exposure's sake" might be associated with "exposure" in Professor Shapiro's scheme—*e.g.*, "exposure of some danger or misdeed . . . essential to our society," *supra* note 8, it may be possible to articulate an interest not wholly opposed to the right of privacy. The difficulty with this is that highly vague goals such as "national security" may add little or nothing to the balance. Everything that Congress does is related in a vague way to national security, as well as to national tranquility, national wealth, or national advancement. Similarly, one may argue that everything Congressmen do is related to the goals of personal publicity or aggrandizement of the power of specific Congressional committees.

¹² Fried, *Two Concepts of Interests*, 76 HARV. L. REV. 755 (1963).

¹³ *Id.* at 769.

¹⁴ *Ibid.*

There is a more basic difficulty with Professor Shapiro's approach. In the course of arguing that "legislative purpose" ought to be downgraded, he criticizes as completely unrealistic the idea of Congress as exclusively a legislative body. He suggests that everyone, except Supreme Court justices, knows that there is no real separation of powers in American government. Professor Shapiro lists as examples the independent regulatory commissions, executive agencies performing judicial tasks, the President's role in originating and vetoing legislation, and even the judicial function of Congress revealed in Congressional investigations.¹⁵ Then, why, he asks, doesn't the Court drop the pretense of "legislative purpose" and accept and frankly use what political scientists have been expounding? The answer to this seemingly harmless question involves the ultimate problem of whether the Supreme Court should find law or invent it—*i.e.*, whether it should really be a "court" or an untrammelled, uninhibited, final, all-wise, political-scientist arbiter of any and all of society's problems.

The following argument against Professor Shapiro's position shall suggest that in fact the application of the test of legislative purpose accords with the Constitution, that therein lies its great merit, and that it could be applied more vigorously in the future. Clearly, the Supreme Court, unlike other courts, is the final arbiter of its own jurisdiction. The question arises whether in any given assertion of competence the Supreme Court has remained within the constitutional limits of a Constitution which admittedly it is free to interpret. In a leading early case of Supreme Court assertion of competence over Congressional investigations the Court required "legislative purpose" behind the investigation because the Constitution "has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments."¹⁶ On the other hand, there is nothing in the Constitution which allows Congress to engage in activities for exposure's sake.¹⁷ Of course the latter could be allowed if legislative behavior under a "living" Constitution is elevated to a normative level by the Supreme Court. But there is a grave danger in doing this in cases which also involve the balancing of governmental "interests" against individual freedoms. In such cases the very authoritativeness of the Court's determination of the balance depends on the constitutionality of the Court's jurisdiction, for if the assertion of judicial competence in a Congressional investigation case is predicated on balancing interests, and if the interests are in turn constitutionally defined (such as "legislative purpose" balanced against "first amendment freedoms"), the Court's definition of the boundaries of its own jurisdiction will comply with the Constitution. Should the Court define the "interests" in non-constitutional terms and thus carve out for itself, or for Congress, a jurisdiction exceeding that which is expressed in the Constitution, it might expect to find its decisions progressively flouted by the public and refused implementation by lower courts acting in conjunction with the President or Congress or the various state governments. It is not reasonable to expect the public and other branches of government to accede to the decisions of a Court which are not founded on what Professor Fried has called

¹⁵ SHAPIRO at 55-56.

¹⁶ *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

¹⁷ Nor is there any warrant for Courts to engage in it (*e.g.*, through the grand jury), nor the executive (*e.g.*, through a special Presidential commission). We might at last have something here which is truly "reserved to the people" under the tenth amendment.

the "fundamental allocation of competences" expressed in the Constitution.¹⁸ By finding, for example, that Congressional investigations can have a constitutionally protected "judicial" or "exposure" purpose, the Court may very well be exceeding the constitutional plan for the allocation of competences, a practice which could extend to other areas of the Court's decision-making. The Court would merely have to keep up with the latest empirical findings of political science about how political institutions are in fact going about, or trying to go about, their self-defined business, incorporate these facts as bases for normative constitutional decisions, and then bless them or curtail them as it sees fit. Yet, if the Court does this, it will soon be exposed as attempting to assert a managerial competence in all disputes far in excess of the constitutional allocation which gives the Court its peculiar socially accepted authoritativeness.

Turning to Professor Shapiro's treatment of legislative apportionment cases, a criticism may be offered more on the basis of political science itself than of jurisprudence. Again, as in the investigation area, Professor Shapiro argues that the Court has failed as a "political scientist" in that it has merely replaced one kind of apportionment inequality (representation based on gerrymandered districts) with another ("one man, one vote"). The latter, he says, is a simplistic "populism" which does nothing to alleviate the real "Madisonian" inequality of "gross underrepresentation for certain groups."¹⁹ The group basis of American politics has resulted in unequal group representation due to the "electoral system *in conjunction with the rest of the political system.*"²⁰ True democracy requires true political equality, but the recent Reapportionment cases, in introducing a "total and immediate equalization of votes," are just as unlikely to yield a democratically ideal result as a "continuation of the present crazy quilt of malapportionment . . ."²¹ According to Professor Shapiro, the Court should have adopted the role of political scientist, undertaking the "admittedly difficult task"²² of determining as well as possible the real political influence of all the groups in a state and then apportioning the votes so as to negate the differences among the various groups and thus assure real political equality.

Although Professor Shapiro's intentions are commendably egalitarian, his presentation suffers from the absence of a model indicating how his program could be implemented.²³ An attempt to construct such a model might have shown Professor Shapiro the clear impracticality of his scheme. Consider, for instance, these several obstacles. How can any group's true political power be measured? It would be circular, and in any case too late, to measure a group's influence by the legislative results it achieves, even if it were somehow possible to trace resulting legislation to specific pressures applied by various groups. Or if power were to be measured on the basis of campaign contributions, how could covert contributions of money or even overt contributions of campaign time, effort, and ideas be assessed? If contributions could be evaluated, how could it

¹⁸ Fried, *op. cit. supra* note 12, at 772.

¹⁹ SHAPIRO at 248.

²⁰ *Ibid.* Italics in the original.

²¹ SHAPIRO at 245.

²² *Id.* at 248.

²³ His plan appears to be a reverse twist on theories of "functional representation" advocated by pluralists early in the twentieth century. See HSIAO, *POLITICAL PLURALISM* 58-90 (1927).

be assumed that the elected representatives will invariably "reward" all their campaign helpers? Further, should a legislator's own membership in various groups count against the votes to be assigned to such groups, thus institutionalizing the idea of conflict of interests? Does it make sense to say that a legislator who is a Methodist, lawyer, Rotarian, and vegetarian has accommodated these interests in all legislation he has supported including bills which objectively appear to be at variance with the publicly expressed desires of one or more of these groups? What about a legislator's "bending over backward to be fair," a situation reminiscent of the Catholic hierarchy's disappointment in President Kennedy's failure to promote aid to parochial schools? How, also, can dynamic factors affecting group power positions be evaluated? Should a group's vote be reduced if its members increase their personal incomes, or if the group lands a government contract, or even merely converts its static real estate holding into cash? Is it possible to assess the dynamics of new elections? A Republican victory in a previously Democratic state would radically alter the relative power positions of all the groups in the state. But then, a judicial reassessment of votes taking into account this new "reality" might also take away most of the support which swept the Republicans in, thus undermining their political power as well as reducing below equality level the power of their supporters. And, is it not true that any group's power is shaped to some extent by the personal ability of the particular legislators to whom the group has access? How could this ever be measured?

Consider, also, whether groups can be adequately defined. An individual voter may belong to a large number of political (or potentially political) groups. Does mere nominal support constitute membership in a group, or does a member have to be an activist to be counted? A related difficulty would be the propriety, if not constitutionality, of defining membership in some groups—which exist in the real world of political science—on the basis of race, religion, or national origin. Additionally, group power must be related to the particular issues before the legislature. Political group constellations fluctuate according to the self-defined importance of the particular issues to existing pressure groups or even to pressure groups which form for the particular purpose of promoting or opposing a specific bill. There is also a basic polycentric problem²⁴ making electoral equalization of group power mathematically improbable. A change, for example, in the political power of group *A* would necessarily affect the voting strength to be assigned to groups *B* and *C*, but not to the same extent since *B*'s vote has been defined in part as a reflection of its power vis-à-vis *C*. A mere similar percentage reduction of *B* and *C* would distort the *B-C* relationship. Thus, even assuming that initial voting power can be assigned to groups *A*, *B*, and *C*, any change in the actual political power of any one group would involve a polycentric adjustment of the powers of the other groups. Such a problem might be computable by a "sequence of successive approximations,"²⁵ but this is unrealistic in a political system where each election necessarily changes all pre-existing power factors.

There seems to be no provision in Professor Shapiro's plan to give representation to the *intensity* of interests of any given group, as is now imperfectly

²⁴ See POLANYI, *THE LOGIC OF LIBERTY* 170-84 (1951).

²⁵ *Id.* at 171.

achieved by the amount of time and money a pressure group is willing to spend to convince legislators of its needs. Should intensity of feeling be measured in apportioning votes to groups, and if so, how? Finally, on the assumption that all these difficulties could be resolved, the result would be precarious anyway. The initial result of total intergroup political equality might be a freezing of the status quo or at best political apathy (why "push" for anything when your power will be nullified by an immediate downward revision of your group's voting strength?). Legislation will reflect superficial if not haphazard "majority rule" of groups rendered equal by the apportionment scheme. This could be subverted rapidly by covert political activities of groups, hidden bribery, exaggerated claims for or against the political power of existing groups, the inventing of thousands of groups and sub-groups to gain equal representation and thus reduce powers of other existing groups, the proliferation of secret societies designed to achieve political power without a loss of voting power, and other more ingenious evasions.²⁶

Some or all of these considerations might have been in the minds of leading political scientists concerned with group theory who have nearly unanimously sought to define representative democracy in terms of the free conflict of group interests²⁷ rather than arguing intuitively that group politics distort some undefinable higher standard of representation. On the other hand, whatever else might be said for or against the Supreme Court's "one man, one vote" rule, it is at least realistic in that it can easily be implemented.

Yet the foregoing criticisms of some of Professor Shapiro's arguments should not operate to obscure the fact that he has made a significant contribution to scholarship in his extension of a political science view of the Supreme Court to the limit of its logic, sharpening the issues involved, and suggesting alternative paths for research and future lines of thought. His willingness to strike forth in new areas of the Court's jurisdiction gives a broad picture of possible roles the Supreme Court might perform. Finally, *Law and Politics in the Supreme Court*, by the very nature of the problems to which it is addressed, has left far behind the controversy between political scientists and lawyers as to whether it is fruitful to view the Court in political science terms. Professor Shapiro has clearly proven that it is.

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²⁶ A more jurisprudential objection to Professor Shapiro's thesis might be that the presently constituted unequal legislative districts reflect someone's notions of proper balance among some groups (*e.g.*, overrepresentation of rural groups necessitated by the existence of more populous city-minded urban groups). If the Court were to enter the "political thicket" in an attempt to redraw the lines in favor of other groups, it would clearly be substituting its own competence as a definer of "groups" for that of the various legislatures. Such a self-definition of the Supreme Court's jurisdictional competence would be difficult to justify constitutionally.

²⁷ See, *e.g.*, TRUMAN, *THE GOVERNMENTAL PROCESS* 501-35 (1951).

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