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Book Reviews

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BOOK REVIEWS

LAW AND POLITICS IN THE SUPREME COURT. By Martin Shapiro. New York: Free Press of Glencoe, 1964. Pp. 333. \$6.95.

The title of this book is misleading. It is neither an account of political attacks upon and defenses of the Court nor a polemic asserting that the justices are playing politics. Dr. Shapiro, Associate Professor of Political Science at the University of California (Irvine), advances instead an approach to what he calls "political jurisprudence." The author contends that "it is impossible to speak in the abstract of the power or function of the Supreme Court. The Supreme Court, like other agencies, has different powers and different functions depending upon who wants it to do what, when, and in conjunction with or opposition to what other agencies or political forces."¹ Failure to analyze the Court in these terms is explained in part, the author believes, by the practice of lawyers and political scientists to focus upon the "Constitutional Supreme Court" rather than upon the equally important and quantitatively larger non-constitutional aspects of the Court's work. "Paradoxically," he concludes, "it is the tendency to look at too little of the Court—its Constitutional business alone—that makes the Court seem so big; a separate and equal 'branch' of government marching through American history waving the huge club of judicial review."²

Professor Shapiro proposes to correct this distorted perspective by a series of case studies examining in detail the work of the Court in various areas of the law. This book is only a start on the whole process, but it is a start and a good one. Three of the five substantive chapters—those on labor, tax, and antitrust law—emphasize the interaction between the Court and the other agencies of government that participate in the policy-making process. The other two chapters—those on review of congressional investigations and reapportionment—focus on the effect that the Court's conception of the political process has on decisions in these areas. In all five chapters the author adopts what he calls the "all case" approach, rather than the "leading case" method, because "it is the day-to-day power over small decisions rather than the ability to change dramatically the whole course of government that often constitutes the key to judicial policy-making."³ However, he has not written a treatise or hand-

1. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 2 (1964).

2. *Id.* at 6.

3. *Id.* at 42.

book for the practicing attorney in each of these fields; each case is considered in relation to the others, but only for the light it can throw upon the role of the Court in policy-making in that particular field of the law. The author has done an excellent job of illuminating the five areas he treats. One need not be an expert in each to follow the discussion. Professor Shapiro provides sufficient detail to enable the reader to follow his thought process yet not so much as to overwhelm him. Unlike the works of so many political scientists today, this book relies on "traditional" rather than on quantitative analysis of the Court's activities. This is not only a refreshing change, it is also an excellent demonstration of the value of such non-quantitative analysis.

In the tax, labor, and antitrust chapters, Professor Shapiro convincingly demonstrates that a prime factor in judicial decision-making is the opinion of the justices as to what should be their relationship to administrative bodies. This is more than deference to administrative expertise. For example, despite the language in which they are couched, or the doctrines which they advance, the labor law decisions seem to be based "on the Supreme Court's desire to harmonize its relations with the NLRB, that is, on questions of the balance of political power *within* the central government."⁴ By contrast, the author finds greater Court activism in the antitrust field because Congress has indicated its expectation that the Court will play a major role in the policy process in this area. Considerations of balance between agencies are still important; the scales just produce a different result.

The chapters on congressional investigations and reapportionment have a different focus. The decisions relating to investigations have been shaped in large part by the justices' misconceptions of the political process. The "valid legislative purpose" test which the Court attempts to apply presumes that the sole purpose of an investigation is to gather information for the purpose of making law. However, investigations have other purposes, including those which Professor Shapiro labels as administrative, educational, judicial, and self-preserved. By formally ignoring these purposes, while trying to limit congressional power as little as possible, the Court involves itself in a maze of paradoxes and presumptions which are clearly unrealistic. It also deprives Congress of any real guidance as to how far the investigative power extends. The author suggests that if the Court would recognize that a congressional investigation is a multi-purpose tool, it could cut through much of the confusion that surrounds its attempts to deal with the problem. He feels, in short, that the Court

4. *Id.* at 141.

has failed as a political scientist in this area.

Professor Shapiro is most critical of the Court in the chapter on reapportionment. While he approves its early decisions, he feels that later cases such as *Reynolds v. Sims* represent an adoption by the Court of one of the two positions that run through American political thought—the Populist as opposed to the Madisonian. One might quarrel with his condemnation of the Populist approach, typified by “one-man, one-vote,” but one cannot quarrel with his assertion that the Court has, through these decisions, adopted a particular political philosophy which shapes its decisions.

This is one of the more important books on the Court's role in the policy process. The approach is not new; it is derived from the insights of the legal realists and Dean Pound's observation that there is a difference between the law in books and the law in action. But Professor Shapiro is one of the few authors to try to integrate a series of studies of the law-in-action into an approach to analysis of the role and function of the Supreme Court. Obviously, five case studies cannot provide a statement of the general role of the Court and the author recognizes this. The importance of the book stems rather from its effort to demonstrate the value of the approach and from its insistence that the constitutional and non-constitutional work of the Court cannot be separated when considering the role of the Court. This is book that should be read by all lawyers and political scientists who are interested in either the role of the Court in the policy-making process or in any one of the substantive areas discussed.

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LIVES OF THE LORD CHANCELLORS, 1885-1940. By R. F. V. Heuston. Oxford: Clarendon Press, 1964, Pp. xxiii, 632.

This is the third of the collected biographies of the Lord High Chancellors of Great Britain. Lord Campbell's *Lives*, which “added a new terror to death,” told the story from the earliest days to the end of the Georgian period. Atlay's *The Victorian Chancellors* carried it down to Queen Victoria's Jubilee. Mr. Heuston's volume, continuing to the beginning of the Second World War, portrays well an extraordinary office and its holders during five reigns.

The Lord Chancellor is the incarnation of the combination of powers, not the separation of powers prescribed by our system of government. He presides over part of the legislative branch, the

House of Lords; he is a member of the cabinet and so a part of the executive; and he is the head of the highest judicial tribunals of the nation, though under the pressure of other duties the judicial side of his work has declined in recent years. He has numerous administrative responsibilities and the largest share in naming members of the judiciary either in his own right or as adviser to the prime minister. He is a political official who goes out of office when the cabinet is overthrown, or earlier if the prime minister so desires, and under the etiquette of the bar he may not return to practice.

The book, covering half a century, treats twelve holders of the office, some serving more than one time. The biographer has drawn widely for his sources—from the Royal Archives and official judgments to unpublished papers and reminiscences. Sketching the judicial contributions of the twelve, Mr. Heuston would place Lords Herschell, Birkenhead and Haldane in a class by themselves as jurists. Of the first, a prime minister said he was the most valuable public servant in Britain.

Mr. Heuston had as a further object to depict the political and personal lives of his subjects, and he has conveyed a vivid sense of them as human beings in a rapidly changing period. Three of them, standing out as vigorous and contrasting personalities, will illustrate the kinds of men the full-bottomed wig and robe may half conceal.

Hardinge Giffard, Lord Halsbury, held the office three times, 1885-1886, 1886-1892 and 1895-1905, in sum longer than any other man except Lord Eldon. A thorough Conservative, he fought the Liberals in politics, in law and in appointments. "In each successive generation of his long manhood he readily adapted himself to the most conservative standpoint of the moment and and voiced its creed in plain and unvarnished language." He opposed the reform of Parliament with its reduction of the power of the House of Lords, and he denied the power of the House of Lords as a court to overrule its own decisions. His long tenure enveloped him with the aura of the law itself, and he lent his name to the two leading compilations of English law: Halsbury's Laws of England, and Halsbury's Statutes of England. As Lord Chancellor he was the foremost subject after the Archbishop of Canterbury, yet he remained throughout a plain man of unconventional simplicity.

Brilliant, audacious, ambitious, engaging, zestful, extravagant, loving pleasure but capable of prodigious bursts of work, F. E. Smith was a man about whom legends grow and stories are remembered. A most successful barrister, he sought a career in politics as well. His maiden speech in Parliament, delivered immediately after a shattering defeat of his party by the Liberals, was made up as he said "of

calculated insolence and sustained invective." Named Lord Chancellor in 1919, he filled the office ably for three and a half years. Then and later, he contributed notably to the reform of the law, especially to the passage of the Law of Property Acts which for breadth of change cannot be matched in this country. Yet his acceptance of the office was a personal mistake, for after his brief tenure he was barred from the activities and fees of a barrister which he needed. He consoled himself in part through his writings. Glorifying in the fact that he was a self-made man, he adopted as the motto on his coat of arms the Latin form of "I Am the Smith of My Own Fortune."

Richard Haldane, a Scotsman educated in Germany, had one of the most varied and effective careers of any man of the common law. An outstanding barrister in chancery and in Dominion constitutional litigation, he refused to let law dominate his life. His second, perhaps even his first, love was philosophy. This deep interest may have led to the qualities that marked him as advocate, administrator and leader—the qualities of reflection and organization. As Secretary of State for War, he renovated the War Office and the British army so as to prepare them for the test he perceived ahead. He is perhaps the only man of law of whom a biography has been written by a military critic; the commander of the British forces in France during the First World War called him the greatest Secretary of State for War Britain ever had. He was Lord Chancellor in the last Liberal government, 1912-1915. Though able and effective, he was driven out of office by the clamor of the lords of the popular press because of his German associations. Throughout his life, he was an ardent and effective supporter of research and of education at all levels. This interest probably led him to accept the office of Lord Chancellor in the first Labor government. Devoted to ideas rather than to people or party, he deserves the words of a commemorative plaque, "Statesman, Lawyer, Philosopher."

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ERRATA

Due to technical problems a number of errors appeared in the article by John W. Reboul, *Horizontal Restraints Under the French Antitrust Laws: Competition and Economic Progress*, which appeared in the March 1966 issue. The corrections shown below should be made. Where confusion might otherwise arise, both the correct version and the term to be replaced are given.

- p. 305 n. 6: LALUMIÈRE,
- p. 305 n. 10: NORR & KERLAN, TAXATION IN FRANCE (WORLD TAX SERIES)
- p. 305 n. 11: NORR & KERLAN
- p. 306 n. 13: "Officiel," not "Official"; and "Française," not "Francaise"
- p. 306 n. 13 line 13: "Commission," not "commission"
- p. 307 n. 15: Delete quotes around justifications (last word in note).
- p. 307 n. 16: Reuter, *A propos des ententes industrielles et commerciales*
- p. 307 n. 16: Loussouarn & Bredin, *La réglementation des ententes: le recul du contrôle judiciaire,*
- p. 307 n. 16 line 34: "C" in "COMMUNAUTÉS" should be in roman, not italics.
- p. 307 n. 16 line 34: FRANÇAIS
- p. 307 n. 17: FRANÇAISE
- p. 307 n. 17: Souleau, *La réglementation des ententes professionnelles dans le décret-loi du 9 août*
- p. 308 n. 18 line 5: substitute "ordinance" for "laws"
- p. 308 n. 18 line 10: Insert "de" before "Provence."
- p. 308 n. 18 line 11: Insert a period after "D.II."
- p. 308 n. 18 line 12: This should read "II.10727" not II.107.27."
- p. 308 n. 18 line 23: Toutée, *Les ententes professionnelles,*
- p. 310 para 2, line 5: "most of the" should be deleted and "the more important" substituted.
- p. 310 n. 23 line 3: RÈGLES PARTICULIÈRES, DE CONSTATATION
- p. 310 n. 23 line 4: L'ORDONNANCE N. 45-1484 DU 30 JUIN 1945,
- p. 310 n. 23 line 5: Delete the period after "I."
- p. 311 n. 27: "Rapport" through "1957" should be in italics.
- p. 311 n. 28: "l'années" should be "les années."
- p. 312 n. 31: The parenthetical should read "(3e éd. refondue 1964)."
- p. 313 para. 2 line 5: Delete "in order to" and substitute "and."
- p. 313 line 6: Delete "to" after "practices or."
- p. 313 n. 37 line 3: Insert a comma after "of the feeling that."
- p. 314 n. 43: "Hamson," not "Harmson"
- p. 316 n. 47 line 11: "ASSIMILÉES à" not "ASSIMILÉES A."
- p. 316 n. 48 line 3: "Toutée" in regular roman
- p. 316 n. 51 line 1: "câbles," not "cables"
- p. 316 n. 52 line 2: The "a" in Article should be in the lower case.
- p. 319 n. 61 line 2: "QUATRIÈME PLAN" (note added accent to 'e' and changed 'P' to lower case.)
- p. 319 n. 61 line 4: Insert comma after "and textiles."
- p. 321 n. 71: "câbles" not "cables"
- p. 321 n. 73 line 4: Insert "Termont," after "and its price."
- p. 322 n. 75: "câbles" not "cables"
- p. 322 n. 78 line 13: Insert a space between "de" and "demi-produits."
- p. 322 n. 78 line 14: Set off "however" with commas.
- p. 323 para. 2 line 3: "influential," not "industrial"
- p. 323 n. 80: "FRANÇAISE," not "FRANCAISE"
- p. 323 n. 83: "QUATRIÈME," not "QUATRIEME"
- p. 324 n. 84: "CINQUIÈME," not "CINQUIEME"
- p. 324 n. 84: "ÉCONOMIQUE," not "ECONOMIQUE"
- p. 324 n. 85: COMMISSARIAT GÉNÉRAL DU PLAN
- p. 325 para. 2 line 2: *groupements*
- p. 325 para. 2 line 9: Insert a comma after "Businessmen."
- p. 325 para. 2 line 10: Insert a comma after "however."

- p. 326 n. 88: Boudin, *Extrait de la discussion finale*, in ENTENTES, FUSIONS, ACTIONS COLLECTIVES (EXPERIENCES DE COLLABORATION INTER-ENTREPRISES) 164 (1962).
- p. 325 n. 89 line 5: *groupements professionnels agréés*
- p. 325 n. 90 line 2: à
- p. 326 para. 1 line 3: European
- p. 326 para. 3 line 1: "ententes," not "entes"
- p. 327 n. 106: HOUSSIAUX
- p. 328 n. 107 line 5: COMMISSARIAT GÉNÉRAL DU PLAN
- p. 328 n. 108 line 1: COMMISSARIAT GÉNÉRAL DU PLAN
- p. 328 n. 108 line 8: COMMISSARIAT GÉNÉRAL DU PLAN
- p. 329 n. 113 line 1: "role," not "rôle"
- p. 329 n. 113 line 1: Commission technique des ententes (in Roman)
- p. 329 n. 113 line 2: HOUSSIAUX
- p. 329 n. 114: "demi-produits en," not "demi-products de"
- p. 330 n. 124: matériel
- p. 331 n. 129: français
- p. 332 para. 2 line 17: the Commission (initial capital)
- p. 333 para. 2 line 7: Insert commas after "would" and "however."
- p. 333 n. 135: "Ententes," not "Entente"
- p. 333 n. 137: Fifth report 11 (delete "See")
- p. 334 n. 140 line 2: fûts
- p. 336 n. 148 line 7: Substitute "to the same extent" for "in the same conditions."
- p. 337 para. 4 line 3: "ententes," not "entes"
- p. 337 n. 157 line 1: Delete the comma after [1963].
- p. 337 n. 157 line 4: "économiques," not "énconomiques"
- p. 338 n. 160: demi-produits (hyphenated)
- p. 338 n. 161: "Id.," not Ibid.
- p. 339 para. 3 line 4: "for," not "of"; and "achievement of," not "achieved"
- p. 339 n. 166: la levure de panification
- p. 340 n. 171 line 2: câbles not cables
- p. 341 n. 180: Entente entre fabricants de demi-produits
- p. 343 n. 187: fûts not futs
- p. 343 n. 189 lines 4 & 5: Theureau & Barbelet, *Entente dans l'industrie de l'acier moulé* (1960); Fourre, *Rapport sur l'entente dans l'industrie de l'acier moulé* (1962).
- p. 343 n. 189 line 12: the Commission (initial capital)
- p. 343 n. 190: Theureau & Barbelet
- p. 343 n. 192: fûts not futs
- p. 343 n. 193: câbles not cables
- p. 345 para. 2 line 5: Insert a comma after "that."
- p. 345 para. 2 line 6: Insert a comma after "business."
- p. 345 n. 199 line 1: 1 RPERT & ROBLLOT
- p. 346 para. 3 line 2: Francaise
- p. 346 n. 202 line 2: août
- p. 347 para. 3 line 1: "The," not "An"
- p. 347 n. 209: intérieur
- p. 347 n. 214: "Entente," not "Entre"
- p. 347 n. 215: Delete the quotation marks.
- p. 348 para. 2 line 2: Delete "to" after "or."
- p. 348 n. 217 line 4: "article," not article"
- p. 348 n. 217 line 6: 11 AM. J. COMP. L.
- p. 349 para 4 line 6: "to institute," not "whether"
- p. 349 para. 4 line 7: Delete "should be instituted."
- p. 349 n. 222: SOULEAU, LES RÈGLES PARTICULIÈRES DE CONSTATATION, DE POURSUITE ET DE RÉPRESSION ÉTABLIES PAR L'ORDONNANCE N. 45-1484 DU 30 JUIN 1945, JURIS-CLASSEUR PÉNAL, LOIS PÉNALES ANNEXES, INFRACTIONS ÉCONOMIQUES I, 10.
- p. 349 n. 223 line 3: SOULEAU, *op. cit. supra* note 222
- p. 350 para. 2 line 27: "37(1)(a)," not "37(1(a))"

- p. 350 n. 225: See generally SOULEAU, PRATIQUES ANTICONCURRENTIELLES ET AUTRES INFRACTIONS ASSIMILÉES À LA PRATIQUE DE PRIX ILLICITE, JURIS-CLASSEUR PÉNAL, LOIS PÉNALES ANNEXES, INFRACTIONS ÉCONOMIQUES, III, 3-75.
- p. 350 n. 227 line 2: FRANÇAIS .
- p. 350 n. 227 line 6: *Etude juridique et économique des conventions d'exclusivité de vente*, [1965] DR. SOC. 1,5.
- p. 350 n. 228 line 2: (Ch. Crim.)
- p. 351 para. 4 line 6: Insert "and" after "flexible."
- p. 351 para. 4 line 7: Insert "to" after "and."
- p. 351 n. 232: câbles not cables
- p. 352 para. 3 line 11: Delete "the" before "domestic."
- p. 352 n. 237: du marché de la
- p. 352 n. 238: "lunetterie," not "lunetterie"
- p. 353 para. 3 line 2: "provides," not "provide"
- p. 353 para. 3 line 5: Delete "provides for graduated scales of rebates based upon the" and insert after Commission "distinguished the case in which these discounts were."
- p. 353 n. 242: Entente entre fabricants
- p. 354 para. 3 line 5: the Commission (initial capital)
- p. 354 para. 3 line 10ff: In the indented quotation, all single quotation marks should be double.
- p. 355 para. 3 line 3: "clientele," not "clientèle"
- p. 355 n. 249: Dufour, *Deuxième rapport sur les ententes existant entre les fabricants de demi-produits en cuivre et en laiton*.
- p. 356 n. 251: agricoles
- p. 358 para. 4: Société générale du magnésium (in roman)
- p. 358 n. 262 line 7: français
- p. 358 n. 262 line 8: Française; and delete semi-colon after [1965]
- p. 358 n. 262 line 9: (note Lyon-Caen),
- p. 358 n. 263: OUSSET, *La concurrence imparfaite dans les industries agricoles et alimentaires*, in LES FORMES MODERNES DE LA CONCURRENCE 257, 290-99 (1964).
- p. 358 n. 264: Delete *Id.* Insert "Entente dans l'industrie de la meunerie parisienne, fourth report" before 317.
- p. 359 para. 1 line 11: Insert a comma after "It concluded that"
- p. 359 n. 269: "Entente," not "Ententre"
- p. 360 para. 1 line 4: Insert a comma after "provided that."
- p. 360 para. 1 line 5: Insert a comma after "France."
- p. 360 para. 1 line 12: Insert a comma after "and that."
- p. 360 para. 2 line 4: Set off "however" with commas.
- p. 360 n. 272 line 5: SOULEAU
- p. 361 para. 3 line 7: Delete the comma after "explanation."
- p. 361 n. 274: CONSEIL D'ÉTAT, ETUDES ET DOCUMENTS
- p. 362 n. 278: "agglomérés," not "agglomé rés"
- p. 362 n. 279: câbles not cables
- p. 362 n. 280: professionnelles
- p. 363 para. 2 line 8: committee
- p. 363 para. 2 line 10: committee
- p. 363 n. 287: ARRIGHI DE CASANOVA, *L'indemnité de "dépossession" dans les rapports entre intermédiaires de publicité*, in DIX ANS DE CONFÉRENCES D'AGRÉGATION, ETUDES DE DROIT COMMERCIAL OFFERTES À JOSEPH HAMEL 459 (1961).
- p. 364 n. 289: DR. SOC.
- p. 364 n. 290 line 3: propriété
- p. 365 n. 296 line 2: After the first word "com." insert "),"
- p. 365 n. 296 line 5: Substitute "crayfish" for "lobster."
- p. 365 n. 296 line 5: Insert a space between "Le" and "Bris."
- p. 365 n. 296 line 6: Insert a period after "III."
- p. 365 n. 299 line 3: "Commission's," not "Commission"
- p. 366 n. 300: Faroult v. Société
- p. 367 para. 1 line 9: that M. Augé

- p. 367 n. 304 line 1: "Etablissements," not "Establisements"
- p. 367 n. 304 line 3: "Recueil," not "Recueil"
- p. 368 para. 6 line 12: Delete "at the request of the Minister of Justice³⁰⁷" and place ³⁰⁷ after "Affairs."
- p. 369 para 3 line 13: Delete "how" after "question of."
- p. 369 n. 309 line 2: Plaisant & Lassier, *Les rapports de la commission technique des ententes, années 1956 à 1959*, [1962] D. CHR. 31.
- p. 369 n. 309 line 4: "Me Tinaud," not Me. Tinaud"
- p. 369 n. 312: "Dorian," not "Dorain"
- p. 370 para 4 line 2: *Glacières*
- p. 371 n. 323: The Cour de Cassation has held, moreover, in a case arising under article 37 that a person injured by a violation of the basic price ordinance, Ordinance No. 45-1483, June 30, 1945, [1945] J.O. 4150, as amended, cannot recover damages by starting criminal proceedings or by making a damage claim in an already pending criminal action. Nicolas, Société Brandt et Société Photo Badio Club, Cour de Cassation (Ch. Crim.), July 11, 1962, [1962] Bull. crim. 504, [1962] D. II 497, [1962] J.C.P. II.12799.
- p. 372 para. 1, line 1: "French," not "Frence"
- p. 372 para. 3 line 9: Commission (initial capital)