

THE *Pioneers* OF  
*Judicial Behavior*

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CHAPTER 16

*Martin Shapiro: Anticipating the  
New Institutionalism*

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I can imagine Martin Shapiro relaxing in his study with a glass of excellent California wine and opening Howard Gillman and Cornell Clayton's collection of essays, *The Supreme Court in American Politics: New Institutional Interpretations* (1999). Within a few minutes, he would be jumping up and down and shouting, "This is what I said thirty-five years ago!!!" And in fact, probably the best description of Shapiro's work, starting with his 1964 book (and the earlier articles that formed the basis of the book), *Law and Politics in the Supreme Court*, is that it anticipates what we today call new institutionalism.

In anticipating the developments of the 1990s, Shapiro's work serves as a bridge, perhaps the *key* bridge, between traditional institutional analysis of the judicial branch and the work of the new institutionalists. His application of what he labels "political jurisprudence" draws heavily on the traditional institutionalist work of Corwin, Mason, and McCloskey (with whom Shapiro studied at Harvard) while taking that work in directions that have become the new institutionalism. His scholarship constitutes a significant contribution to institutional analysis along at least three different dimensions:

- understanding courts and court processes as institutions;
- understanding the institution of courts in the larger political system; and
- understanding the institutional functions of judicial norms.

Shapiro's work starts with a focus on the American context but moves in a comparative direction starting in the mid-1970s. In the discussion that follows, I consider three interrelated strands of work:

- his definition of political jurisprudence and his early application of that concept to institutional analyses of the Supreme Court and administrative law;

his efforts to apply political jurisprudence beyond the American context; and  
his theoretical analyses of the judicial norm of stare decisis.

In this necessarily brief essay, I will neglect many areas of Shapiro's scholarship (e.g., his later work on administrative law and his most recent work on the European Court of Justice).

### THE CONCEPT OF POLITICAL JURISPRUDENCE

The transition from the old to the new institutionalism is central to Shapiro's concept of political jurisprudence. This term appears in the subtitle of his first book, *Law and Politics in the Supreme Court*, and as the title of Shapiro's 1964 essay in the *Kentucky Law Journal*. In Shapiro's words, the "core of political jurisprudence is a vision of courts as political agencies and judges as political actors" (1964b, 196). The implication is that courts and judges can and should be subjected to the same type of analysis routinely applied to other institutions of government and their institutional actors.<sup>1</sup> While his institutionalist predecessors—Corwin, Mason, and McCloskey—wrote about the Court's institutional features, they typically emphasized what made the Court unique among the three branches of government rather than what made the Court one of several distinctly political institutions within the American scheme of governance.

Political jurisprudence, the roots of which Shapiro traces to sociological jurisprudence<sup>2</sup> and legal realism (1964b, 294), encompasses a range of analyses of the Supreme Court and courts more generally. These include interest group use of the courts (after David Truman's *The Governmental Process*), the Court as policymaker (after Robert Dahl's "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker"), judges' decisions as reflecting underlying attitudes (after Glendon Schubert's early work as well as that of Herman Pritchett), and justices as members of a small group subject to leadership and group dynamics (after work by Eloise Snyder, Sidney Ulmer, Walter Murphy, and David Danelski). Political jurisprudence captures all of these threads in "an attempt to treat the Supreme Court as one government agency among many—as part of the American political process, rather than as a unique body of impervious legal technicians above and beyond the political struggle" (1964a, 15).<sup>3</sup>

Today this argument seems trite. Among political scientists, even the most vehement proponents of "legal" explanations of Supreme

Court decisions accept the major or even central role of justices' preferences. Scholars in the legal academy may argue about whether justices' attitudes *should* be as important as they are, or scholars may argue that *some* justices are driven by attitudes (almost always the justices with whom the scholars disagree), but here, too, virtually no one would argue that the justices are simply legal technicians who apply neutral principles of analysis to arrive at neutral results. However, in the early 1960s, when what Shapiro called political jurisprudence was beginning to displace the more traditional approach associated with "public law" within political science, the movement came under fierce attack. The dominant school of analysis, reflected in the writing of political scientists such as Robert McCloskey and Wallace Mendelson and prominent legal academics such as Alexander Bickel, endorsed a view of "judicial modesty" that sought to show that the actions of courts and judges were grounded in legal principles (Bickel 1962) or at least in neutral principles (see Wechsler 1959). This approach had reasserted itself in the wake of Herman Pritchett's controversial book, *The Roosevelt Court* (1948), which dared to posit the importance of justices' values in decision making—a rather ironic response given the controversy of a decade earlier over the "nine old men" of the Supreme Court. As with the reaction to Pritchett's work, the developments Shapiro labeled political jurisprudence produced a vocal assault from the establishment. Paul Mishkin, in the foreword to the *Harvard Law Review's* issue devoted to analyses of the Supreme Court's 1964 term, remarked that although political jurisprudence "has core soundness, carried too far it exerts a corrosive effect upon the symbolic ideals and the felt duty of fealty to Court decisions" (68). Even a decade later, prominent legal academics found it necessary to attack political jurisprudence. Archibald Cox delivered a set of lectures on the Supreme Court at Oxford in 1975; in the published version of those lectures, he specifically cites *Law and Politics in the Supreme Court* as representing a "school of political scientists in the United States that likens the Court to purely political agencies" that by "substituting a manipulative for a moral view of the judge's role" ultimately would "raise questions of [the Court's] legitimacy and thus undermine both the Court and the impact of its decisions" (1975, 106, 107–8).<sup>4</sup>

While Shapiro defined political jurisprudence to include attitudinal approaches to the study of justices' voting decisions, his work turned more on thinking about the Supreme Court and courts more generally as agencies of government. In this focus, he adopted an institutional approach. What differentiated his institutional approach from that of

his institutional predecessors was his concern with the politics of institutions and institutional relationships. That is, Shapiro's institutionalism was that of political institutions rather than of legal institutions. He was concerned about the strengths and weaknesses of courts as institutions intimately involved in creating, shaping, and/or interpreting policy. He wanted to compare courts to other institutions in this broadly defined policy process. Law, in Shapiro's view, is a tool of policy rather than some lofty ideal of behavior that stands above the political fray.

EXPLICATING POLITICAL JURISPRUDENCE I:  
*Law and Politics in the Supreme Court*

The core of political jurisprudence is that courts are courts, but courts are also political institutions—hence the linking of *jurisprudence* with *political*. Shapiro sees courts as amenable to the same type of analysis as other political institutions; however, that does not mean that he sees courts as just another political institution. While he rejects efforts to set courts above politics, such as that represented by Herbert Wechsler's "neutral principles" (1959), Shapiro recognizes that courts interact in the political/governmental system in different ways than do legislative and administrative agencies. These differences serve to distinguish the role of courts in the policy process. *Law and Politics in the Supreme Court* develops this argument in detail. The thrust of Shapiro's analysis is that the Supreme Court's role in the policy process varies substantially from area to area. The variations depend on factors such as the need for technical expertise, the level of detail involved in the area, the constitutional or statutory nature of issues, and the nature of the policy implementation process.

Central to Shapiro's analysis is the relationship between the Supreme Court and other actors. He develops an argument that today we would label principal-agent theory. The Supreme Court must be attuned to what those it seeks to influence or direct will in fact do. Simply saying X wins and hence Y must do whatever X has sought to have it do is insufficient; the Court must persuade Y that there is a good reason that the Court is saying that X wins; the result is that the Court must provide "carefully reasoned and consistent opinions" (Shapiro 1964a, 24). The opinions not only persuade the loser of the need to conform to the Court's position but also (1) guide future actors in predicting the likely outcome of future cases and (2) present an image consistent with popular and professional expectations of neutrality (31). In one sense, Shapiro acknowledges attitudinalists' arguments that the Court's opinions are rationalizations, but unlike the attitudinalists, he

goes on to identify the other functions of opinions vis-à-vis the policy process. Court decisions are more than naming winners and losers: they are one of the major vehicles through which the Supreme Court provides guidance to its "agents," whether they are lower courts, executive agencies, or the legislative branch of government. While political scientists have used the terminology of principal-agent theory to understand the relationship between the Supreme Court and other governmental actors (Brent 1999; Songer, Segal, and Cameron 1994), the emphasis has been on the Court's decisions more than on its opinions. Shapiro's analysis implies that we need to consider not just the direction of what the Court is doing but also what the Court is saying about why it is reaching the decision it is reaching.

If Shapiro were writing this book today, he might well point to the example of *Oncale v. Sundowner Offshore Services Inc* (523 U.S. 75 [1998]) as an example of the principal-agent theory of Supreme Court opinions in action. In *Oncale* the court unanimously ruled that workers could sue for claims of same-sex sexual harassment. Looking at winners and losers, *Oncale* appears to be a clear win for harassment victims and liberal groups such as the American Civil Liberties Union. However, the opinion, written by Justice Scalia, has turned out to limit more generally claims of sexual harassment. In the opinion, Scalia observes, "Title VII prohibits 'discriminat[ion] . . . because of . . . sex,'" and continues,

[The plaintiff] must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] . . . because of . . . sex. . . .

[Title VII] does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory "conditions of employment."

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. [Citations omitted.]

The result of the opinion, as distinct from the decision favoring victims of same-sex sexual harassment, has been to disadvantage sexual harassment victims more generally. Trial courts are granting summary judgment and being upheld on appeal on the grounds that the plaintiff failed to prove a gender basis for the alleged discrimination or that even relatively aggressive behavior by male coworkers was "ordinary socializing" (Greenburg 1999). What mattered in this case was the opinion, not the outcome, which is precisely why Shapiro argues that to understand the Court's role in the policy process we must look to what the justices say as much or more than what they do. Other actors in the policy process are constantly attuned to what the justices say (Shapiro 1964a, 39–40).

In one sense, this is because many cases raise multiple issues. In *Oncale*, the Court clearly addressed two related but distinct issues: Does Title VII extend to same-sex sexual harassment? What types of behavior are actionable under Title VII? In other cases, the separate issues may be quite unrelated to one another (e.g., *Craig v. Boren*, 429 U.S. 190 [1976], which had both a major question regarding standing and a major question of equal protection). Shapiro observes that analysts must fall back on relatively traditional approaches of legal analysis of

fact patterns and the issues that they raise to identify and separate out the distinct issues (1964a, 36). The multiple issues serve to structure the Court's decision, and this structuring lies more in the hands of the parties than in the Court as policymaker.<sup>5</sup> More generally, the issues presented to the Court constrain the range of policy choices the justices can make (37); unlike other agencies, which can initiate policy change *sua sponte* (to use the legal term), the Court is limited to the cases and by the records that come before it, although the justices can certainly invite issues to be brought.

The bulk of *Law and Politics in the Supreme Court* examines the different kinds of political roles the Supreme Court plays in five different areas of decision making: review of congressional investigations, labor law, federal tax policy, representation (*Baker v. Carr*, 369 U.S. 186 [1962] and its aftermath), and antitrust. In his analysis, Shapiro pays attention to winners and losers but is more interested in understanding how the Court's decisions influenced other actors in the policy and political process. Shapiro looks closely at what the Court says because of his argument that the Court's words ultimately guide the other actors. With an updating of the cases covered, the discussions of the various areas could readily be found in a volume of writing by new institutionalists (Clayton and Gillman 1999; Gillman and Clayton 1999). His analyses are not simply a lawyer's doctrinal discussion; instead, he closely examines the give-and-take among institutional actors seeking to stake out positions and communicate those positions to players. Shapiro sees communication of positions and expectations as central to the policy-making process, and the justices must pay careful attention to what they say in their opinions because of their communication value. The reasoning and reference to prior cases are not simply rationalization; rather, they are an essential road map of the justices' thinking that others in the policy process—lower courts, agencies, Congress—must consider. In a fundamental sense, the opinions are a major element what some have called the "separation of powers" game (see Epstein and Walker 1995; Eskridge 1991a, 1991b; Knight and Epstein 1996; Marks 1989; Segal 1997); a key element of that game is information, and the opinions provide information—albeit not always unambiguous information—to the legislators who must decide how to respond to the Court's decisions, a point made by those who look not just at Court's response to legislators but also at the legislators' response to the Court's decisions (see Eskridge 1991a; Melnick 1995; Pickerill 2000).

Through his case studies, Shapiro demonstrates the strengths and

weaknesses of the Court's major institutional advantage: functioning as a generalist in a world of specialized policy subsystems—for example, agencies, subcommittees, and interest groups (see such classics as Hecko 1978; Lowi 1969).<sup>6</sup> One result is that the Court has difficulty dealing with extremely technical, nitty-gritty areas such as the federal tax code (Shapiro 1964a, 154–67). The Court's generalist nature means that it can be most effective as an intervener in the policy/political process when it can make broad pronouncements that establish general principles of action. Without getting into the debate over whether the Court is a "hollow hope" (Rosenberg 1991), decisions such as those in the wake of *Baker v. Carr* led to significant changes in the composition of legislative bodies at the state level.<sup>7</sup> In other areas, the Court is thrust into the policy process by other actors (e.g., by Congress in the area of antitrust) as a means to allow the delegating entity to avoid making difficult decisions; the generalist nature of the Court does not well equip it to deal with the complexities of economic reality raised by significant antitrust issues, as the recent/current Microsoft case demonstrates: What expertise would the Supreme Court bring to the resolution of thorny technical issues that the law seems to assume a court can sort out? Nonetheless, the Court (or at least the courts) must decide these cases and in so doing must make choices that are fundamentally political. While the form of the Court's decision process may differ from that used by administrative and legislative bodies, and while the Court may make reference to legal standards rather than political interests, the Court is making political choices as well as legal choices when it decides cases. In making these choices, the Court itself determines its role vis-à-vis the other institutions of government.

#### EXPLICATING POLITICAL JURISPRUDENCE II:

##### *The Supreme Court and Administrative Agencies*

Four years after the publication of *Law and Politics in the Supreme Court*, Shapiro published *The Supreme Court and Administrative Agencies* (1968b), which shifted the focus from legal areas where the Supreme Court plays a major lawmaking role to areas where it, along with administrative agencies, plays a "supplementary" lawmaking role. The areas explored in *Law and Politics* generally concerned either constitutional pronouncements (e.g., apportionment, institutional powers, free speech, and so on) or effective congressional delegation to the Court of major lawmaking responsibilities (antitrust, important elements of labor law). As discussed earlier, Shapiro's analyses of these areas

emphasized the Court's political role and the importance of the Court's opinions for the larger political process.

In this second book,<sup>8</sup> Shapiro continues to move his application of political jurisprudence beyond the constitutional realm that then dominated political scientists' writings about the Supreme Court. Shapiro describes this as part of an effort to move the research agenda for courts scholars "outward and downward . . . to lower courts and bodies of law other than constitutional" (letter to author, May 15, 2000). This was not surprising, given that Shapiro saw courts' role in the political system in very broad terms. In his first year of teaching at Harvard, he created a course called American Judicial Government, so titled so that it would fall right next to V. O. Key's course on American Party Government.

*The Supreme Court and Administrative Agencies* examines the Court's political role in its relations with a variety of administrative agencies, with particular focus on the Patent Office and the Federal Power Commission. Shapiro chose these two agencies because they represent "near to the two extremes of judicial review of administrative decision making; one at which the Supreme Court persists in major opposition to agency policy, the other where the Court acquiesces in the agency position, imposing only a very marginal check on its actions" (1968b, 264). In both of these areas, the agencies and the Court function in the context of relatively well specified legislation and hence assume a supplementary lawmaking role within the boundaries set by statute. In contrast to the constitutional arena, in these areas "judicial policy making . . . can rarely move public policy more than a few degrees off the directional line set by the statute" (21).

The core of Shapiro's argument is that the Supreme Court and the administrative agencies function as competing subordinate lawmakers within a particular policy domain. The terms of the competition are set by the statute, and hence the law made by the Court and the agencies tends to lie at the margin rather than the core of setting policy. In some areas (e.g., antitrust and labor), because of the huge gaps left by congressional enactments, the courts may play a more central role (see Shapiro 1968b, 25–26), but even here the courts are engaged in subordinate lawmaking and are subject to being reined in by Congress whenever it so chooses.

The agencies and the courts differ in how they go about their subordinate lawmaking. Shapiro argues that many of the supposed differences are less than would appear to be the case at first glance. For example, *stare decisis*, supposedly a particular feature of judicial process, can be viewed as a specialized form of incrementalism. (See the

subsequent section on *stare decisis* for a detailed discussion of the topic.) For Shapiro, the biggest difference comes back to that between the generalist and the specialist rather than any uniquely legal style. The judicial setting may also allow for the participation of interests excluded from the administrative setting, the result of which is to make the court venue in a sense more political than the administrative setting. Moreover, the Supreme Court's "actions are less important as discrete pronouncements on legal-doctrinal questions than as episodes in the evolution of public policy" (Shapiro 1968b, 226). This of course assumes that the Supreme Court acts in response to administrative agencies; in reality, very few agency decisions are appealed to the courts, and when cases make it to the Supreme Court, the Court tends to defer to the agencies.<sup>9</sup> There are, of course, exceptions, such as when a new administration attempts to sharply change long-standing administrative decision patterns without congressional action and those affected swamp the courts with appeals, as in the early 1980s in response to the Reagan administration's efforts to reduce the Social Security disability rolls (see Mezey 1988). Both because the courts sometime stand in opposition to administrative action and because of the importance of a policy process that is open to involvement and influence,<sup>10</sup> the courts are important actors even when the role they play is that of subordinate lawmaking.

Administrative law remained a central part of Shapiro's work, reflecting his belief that courts are important politically for the full range of areas they touch. However, Shapiro's efforts to move courts scholarship "outward and downward" was by no means limited to the nonconstitutional decisions of the U.S. Supreme Court. The agenda of political jurisprudence extended to courts outside the United States and to areas of law, customarily labeled private law, long ignored by political scientists. In the next two sections, I discuss these threads of Shapiro's pioneering efforts.

#### EXTENDING POLITICAL JURISPRUDENCE TO COMPARATIVE STUDIES

Shapiro's 1981 book, *Courts: A Comparative and Political Analysis*, represents his most comprehensive effort to extend political jurisprudence beyond the U.S. context. While interest in comparative judicial studies grew throughout the 1990s (Epp 1998; Holland 1991; Jackson and Tate 1993; Jacob et al. 1996; Kenney, Reisinger, and Reitz 1999; Stone 1992; Tate and Vallinder 1995), *Courts* was published at a time when

courts were largely ignored both by U.S. political scientists who defined their field as comparative politics and by non-U.S. political scientists studying their own countries.<sup>11</sup> Outside of the United States, courts were (and largely still are) seen as something apart from politics and hence not an appropriate focus of study by political scientists.<sup>12</sup> In *Courts*, Shapiro seeks to bring the comparative study of courts to a wider view within political science and to do so by developing the argument that the political jurisprudential view—that courts should be thought of as political agencies of government and judges as political actors—extends to courts from diverse countries.

Shapiro's strategy is to take on the idealized view of courts as triadic dispute resolvers whereby two disputants turn to a third party to obtain a resolution based on existing principles of law. According to this view, courts are distinguished by four characteristics: "independence, adversariness, decisions according to preexisting rules, and 'winner-take-all' decisions" (1981, vii). His core argument is that these characteristics, taken together, represent the basis of the "courts are different" or the "courts are not political" perspective. Shapiro does not reject the position that judges *may* exhibit independence, that the judicial process *may* be adversarial, that decisions *may* reflect preexisting rules, or that courts *may* make "winner-take-all" decisions. Rather, he argues that examples contradicting these propositions are not simply rare exceptions but routine or dominant events even in settings where the proposition is taken most seriously. Courts, according to Shapiro's analysis, routinely replace adversarial contests with mediational processes and seek to find compromise solutions rather than declaring one party the winner; neutrality on the part of judges is often more stylized than real, and judges cannot avoid going beyond even the most comprehensive preexisting rules to deal with inevitably unique situations. Most fundamentally, the role of courts and judicial processes is to maintain the legitimacy of the regime, and most elements of the court system serve to advance this function.

The thrust of Shapiro's analysis is straightforward. When one looks closely at the prototype and nature of the deviations from the prototype, it is apparent that the courts function largely in support of the political regime. When it is in the interest of the regime to appear neutral and above fray between the disputants, the courts put this image forward. Conversely, the structure of judicial selection, appellate process, nonadjudicatory dispute resolution, and so forth work to support the interests of the regime in terms of stability and legitimacy. On the subject of appeal, for example, Shapiro observes that

appellate institutions are more fundamentally related to the political purposes of central regimes than to the doing of individual justice. [With regard to conflict resolution] appeal [is] an important political mechanism for both increasing the level of central control over administrative subordinates and for ensuring the authority and legitimacy of rulers. . . . When trial courts or first-instance judging by administrators is used as a mode of social control, appeal is a mechanism for central coordination of local control. (1981, 52-53)<sup>13</sup>

Shapiro goes on to label appeal a "mode of hierarchical political management" that also provides some assurances of fairness to the disputants (54). But even on the fairness dimension, of most importance is the role of appeal in counteracting the fundamental instability of the court's triadic form: as soon as the adjudicator makes a decision, the triad becomes a two-against-one structure. Appeal provides a mechanism of reassuring the loser of a fair process, thereby maintaining the political legitimacy of the authority under whose auspices the court functions. The importance of perceptions of a fair process have been confirmed in the years since *Courts* by the "procedural justice" work in law and psychology (see Lind and Tyler 1988; Tyler 1990).

Vital to Shapiro's argument about the political importance of appeal for the central regime is the near-universal use of some appeals procedure. As a test of this point, Shapiro examines a legal/judicial system that does not involve an appeals mechanism, *kadi* courts in Islam. The thrust of Shapiro's analysis is that the absence of appeal mechanisms reflects the absence of centralized authority. Where there is centralized secular authority, mechanisms of appeal are superimposed on the Islamic system. Shapiro looks specifically at the Ottoman Empire and argues that while there was no institutionalized appellate structure, the *divan* (council of the sultan) functioned as an appellate body, hearing complaints against lower-level officials including *kadis*, although there was a dominant tendency to support the *kadis*, which in turn would be consistent with the political argument Shapiro makes about the role of appeal.

A second central theme of the "legal" view of courts is the role of independence as a central characteristic of the adjudicator. For Shapiro, the question concerns independence from whom or from what. While it is easy to show the tension between independence and accountability in the jumble of selection systems used in the United States, other countries have adopted systems that ostensibly insulate

judges from "politics." Shapiro argues that while adjudicators may be independent of the immediate parties to a private dispute, they are not independent of the political regime, even in systems that design selection systems to be outside the day-to-day political arena. In most countries, although the judiciary is separate from the "political" branch of government, the bureaucratic structure of judiciary and the resultant recruitment and promotion systems insure a form of centralized control that reflects the regime's interests (see esp. Abe 1995; Lafon 1991).

Shapiro focuses on England for his analysis of judicial independence. He does not argue that English judicial independence is mythical but rather that there is less independence than at first appears to be the case. Courts in England developed largely as part of the centralization of power: the common law courts enunciated and enforced the law that was common to the king's dominion; the courts of equity served as the vehicle for the king's chancellor, the chief administrative officer of the realm and the "conscience of the king" (Shapiro 1981, 85), to deal with gaps and problems in the common law and its writs. By the mid-nineteenth century, the hierarchical structure of the English court system was more or less in place (although courts have been combined, renamed, abolished, and so forth over the past 150 years, the major structure has remained recognizable), and the subordination of the courts to parliamentary supremacy was firmly established (including Parliament's power to create and abolish courts at will). Until recently (that is, since *Courts* was published), the central regime's interests have been kept largely out of the traditional courts by creating specialized administrative tribunals to deal with issues arising from the implementation of government policy; unlike the United States, appeals from tribunals to the courts were rarely permitted. (For a discussion of the few exceptions, see Karlen 1963, 132-33.)

Shapiro discusses evidence of some involvement of judges in reviewing actions of government officials starting as early as the 1940s and 1950s and culminating in the 1958 Tribunals and Inquiries Act (1981, 118-21), but he suggests that those changes were nothing more than "the judges' refusal finally to be pushed entirely out of the field of judicial review of administrative decisions" (121).<sup>14</sup> Subsequent developments raise questions about Shapiro's skepticism: over the past twenty years, there has been a sharp increase in the frequency of judicial review (see Sunkin 1993), which is handled by a specially designated panel of judges from the Queen's Bench Division of the High Court, which is known as the Divisional Court (Jacob et al. 1996, 151-52). In addition, European law has begun to increase the courts' role relative to Parlia-

ment: the Human Rights Act of 1998, which became effective in October 2000, incorporated the European Convention of Human Rights into British law and almost certainly will further shift power to the courts.

Yet this increasing role of courts does not negate Shapiro's argument. The selection of judges of the high courts is largely in the hands of the lord chancellor, who is a member of the ruling government cabinet.<sup>15</sup> While the lord chancellor relies on staff in the Lord Chancellor's Department for much of the work of judicial selection, and while there have been calls to change selection processes and criteria to make the process more open, nothing in the proposals significantly changes the focus on candidates who are safe in the political sense. While occasionally, someone may find his or her way to the bench and subsequently act in a genuinely independent fashion, the strong norm today of promotion up the judicial ladder; High Court judges are selected mostly from those serving in part-time judicial positions such as recorder, and the High Court judges are the primary source of Appeal Court judges, who in turn are the primary pool of candidates for the Judicial Committee of the House of Lords (see Maleson 1997).<sup>16</sup> This means that those who are too independent, at least vis-à-vis the policy of the sitting government, are unlikely to move up the judicial hierarchy. One interesting but as yet unanswered question is whether judges selected by the lord chancellor of one party are more likely to strike down the actions under a government of the other party.

Finally, regarding the limited nature of judicial independence, recent research provides further evidence in support of the view that courts serve first the regime and then the parties. A number of studies of court outcomes have built on Marc Galanter's distinction between "haves" and "have nots": by and large, haves come out ahead in litigation, Galanter argues, because of institutional and resource advantages that accrue to "repeat players" who both learn how to use the system and have a long-term stake in how the system operates (1974). One generally consistent result of the studies of court outcomes, both at the appeals level and the trial level, is that government litigants are more successful than nongovernment litigants. Most researchers have interpreted these patterns as reflecting the government litigant as the consummate repeat player (Farole 1999, 1054-55; Songer, Sheehan, and Haire 1999, 830). However, a more political interpretation is that courts have a built in bias toward or deference to the regime of which they are a part (Farole 1999, 1056). In some ways, this makes sense because government litigants often are actually resource poor rather

than resource rich, and many government legal departments in the United States are marked by high turnover as young attorneys move through, gain experience, and go off to find their fortunes. It is interesting that Shapiro has never weighed in with this observation, which his work in *Courts* can be seen as anticipating; then again, no one who has reported the pattern of governmental dominance has connected it to Shapiro's argument about the limitations of judicial independence vis-à-vis the governments for which the judges work.

#### STARE DECISIS AND POLICY-MAKING IN THE COURTS

As should be clear from the preceding discussion, one of the central themes of Shapiro's work is that the courts are intimately involved in the policy-making process. Of course, this view is not original to Shapiro; rather, Shapiro's institutional approach to understanding the role of courts in policy-making distinguishes his work. Importantly, a central element of his analysis revolves around the uniquely judicial/legal concept of stare decisis, an issue that he discusses in a set of three interrelated articles. Through this stare decisis trilogy, he not only shows the strong links between policy-making in the courts and in the other institutions of government but also ultimately reconstructs a role for stare decisis in areas of policy-making that the courts dominate. This reconstructed role differs sharply from traditional jurisprudential views of stare decisis, which continue to reappear in attacks on the so-called legal model of Supreme Court decision making by proponents of the attitudinal model (see Brenner and Spaeth 1995; Segal and Spaeth 1996; Spaeth and Segal 1999). By focusing largely on private law issues, this work on stare decisis extends analyses based on political jurisprudence in additional areas long neglected by political scientists.

The first of the trilogy articles was "Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?" (1965).<sup>17</sup> This article is part of the "task of political jurisprudence," which is an effort to "describe the functional similarities, difference and interrelationships of courts to other political agencies, and, in light of this description, prescribe what the courts might best contribute to the political system." The article's specific goal is "to describe a method of decision-making that is shared by courts and other political agencies" (136).

As the title suggests, the common form of decision making Shapiro seeks to attribute to the courts is incrementalism (as described in the work of James March [see Cyert and March 1963] and Charles Lindblom [1959, Braybrooke and Lindblom 1963] and as exemplified in

Aaron Wildavsky's *Politics of the Budgetary Process* [1964]). Incrementalism, Shapiro observes, is "a method of decision-making that proceeds by a series of incremental judgments as opposed to a single judgment made on the basis of rational manipulation of all the ideally relevant considerations" (1965, 37). Shapiro's explication of incrementalism is straightforward, focusing on elements such as "margin-dependent choice," "themes" rather than "rules," "serial analysis and evaluation," sacrificing, standard operating procedures, feedback loops, and so on.

Shapiro contrasts incrementalism to what he labels the theory of *stare decisis*: "there are rational and immutable legal principles imbedded somewhere in the life of the law and . . . the technique of *stare decisis* facilitates the legal system's discovery of those principles" (1965, 142). Shapiro argues that incrementalism is a much better description of the process of judicial policy-making than is *stare decisis*, in no small part because of the fundamental flaws of the classical view of *stare decisis* (i.e., judges typically had a variety of alternative lines of precedent from which they might choose, and there is no way of specifying which line of precedent was correct). The core of Shapiro's analysis is that precedent is best conceived not as an immutable line of binding principles but as reflecting a particular style of incrementalism.

As a source of the incrementalist view within common law jurisprudence, Shapiro turns to the work of Karl Llewellyn (1960). Llewellyn sees U.S. courts at midcentury as engaged in a process of incremental policy change—that is, lines of precedent do not reflect "fluctuations around a locus of principle, but as the record of a series of marginal adjustments designed to meet changing circumstances" (Shapiro 1965, 142). Shapiro's concern here is not so much with who wins and who loses in specific cases but rather with the evolution of legal doctrine that guides the actions of potential future litigants. His position is that while attitudinal explanations might go a long way—even all the way—toward accounting for wins and losses, more institutional explanations of processes and norms are required to account for the policies reflected in judicial doctrines. Judges may seek to move policy in particular directions, but the norms of incrementalism inherent in the institution of the common law limit the amount of movement judges can justify on most occasions; although judges can have clear and immediate impact on the parties in the case at hand, the impact of any one decision on future parties is more limited because of the incrementalist constraint.

Incrementalism thus allows for more freedom than does the traditional view of *stare decisis*. At the same time, incrementalism recog-

nizes the "lawyer's and judge's concern for precedent, stability, [and] long-standing practice" (Shapiro 1965, 155). Incrementalism allows—even encourages—lawyers and judges to seek out new paths; at the same time, incrementalism limits the degree of departure for those paths. The result is stability and gradual change coexisting in the law without a mechanical adherence to prior decisions. Judicial choice is real and inevitable; however, judges' freedom to choose among alternatives is incremental in nature, not an unbridled freedom to make radical departures to achieve policy goals.

As indicated by its title, "Decentralized Decision-Making in the Law of Torts" (1968a), the second article in the *stare decisis* trilogy, looks at the evolution of tort policy through a process of decentralized decision making. In this analysis, Shapiro views *stare decisis* primarily "in terms of socialization, of essentially tribal experience into which new initiates are integrated through ritual and education" (49). Shapiro chooses tort policy because it is an area traditionally dominated by the courts rather than the legislatures. Moreover, there are more than fifty distinct tort regimes within the United States, but they have a striking resemblance to one another. Shapiro asks what accounts for the fact that we do see a number of radically different tort regimes. Nothing requires that Wisconsin's tort regime closely resemble that of Arizona: although a Wisconsin practitioner might look at Arizona and see significant differences (and vice versa), a *bengoshi* from Japan or an *avocat* from France would see a single system with very minor variations.

Shapiro finds the answer to the puzzle of similarity in the flow of communication among the disparate decision makers combined with "(1) a common culture and historical experience, (2) a common professional discipline, (3) shared channels of communication and incentives to use them, and (4) a piecemeal system of messaging that leads to large volume, constant communication" (1970, 51). The result of all of these factors is the emergence of a "collective opinion" (51). The norms of the system require decision makers to be attentive to decisions of others, and the system of publication of appellate decisions insures that there is a large flow of communication. The receivers of these communications share a common perspective on their significance and see them through very similar perceptual screens. These commonalities result from core law school curriculums that differ little in content; the similar content in turn flows from the almost universal case method of teaching and the dominance of a small number of very similar casebooks for teaching key areas of the law (e.g., torts).<sup>18</sup> Shapiro traces the evolution of doctrine vis-à-vis some important issues in tort (e.g.,

"attractive nuisance," "charitable immunity") to show how courts in disparate jurisdictions incrementally sought out solutions to new problems created by technological and social developments as well as how these solutions become crystallized through writing of academics and through the Restatement of Torts. In some ways, Shapiro is describing the analogic reasoning process that marks common law legal reasoning (see Levi 1961). What distinguishes Shapiro's analysis is that he sees this as very much at one with policy development in institutions other than the courts. That is, while there may be some unique communication tools and some unique language, the accretion of case law is the quintessential incremental process.

While much of the debate over the role of courts in American society has turned on the movement of public issues from the legislative arena to the judicial arena, Shapiro raises the fascinating question of movement in the other direction. Whereas some issues have traditionally been seen as political and properly the realm of the "political" branches of government (e.g., provision of government services and legislative districting), others have been accepted as properly the realm of the courts (the classic private law issues of tort, contract, property, and inheritance). Just as the failure of the political branches to deal with key issues in their realm has led courts to assert authority, the failure of the courts to deal with key issues in their traditional areas have led the political branches to act (e.g., marital property, punitive damages, joint and several liability). Thus, while the courts are subordinate, supplementary lawmakers in some areas, in others the courts are the primary lawmakers, with the legislative branch playing the supplemental role.

The last leg of the stare decisis trilogy, "Toward a Theory of Stare Decisis" (1972), turns further to communication theory to specify how we might understand the role of case law and hence stare decisis in judicial policy-making/decision making. On one level, the norm of stare decisis is primarily an organizing principle of legal discourse in a common law system. Implicitly, this contrasts to the code law systems of Europe, which rely on treatises explicating code provisions rather than incremental and redundant communication inherent in a system claiming to rely on precedent. This distinction's importance lies in the contrast between redundancy and information that Shapiro emphasizes from communications theory: redundancy is important when information is low.

What is the significance of the fact that judicial decisions and judicial arguments in the form of lawyers' briefs emphasize redundancy while suppressing information? Emphasizing redundancy goes hand in hand

with the incremental view Shapiro presented in the earlier articles in the trilogy. If cases were treated as genuinely unique, requiring new perspectives and new approaches, that would constitute pressure for unique solutions to each case. Redundancy emphasizes commonalities and provides choices among existing solutions. To the degree that a case does present a unique combination of issues and that those issues are communicated through reference to a variety of different cases, this communication serves to focus the decision maker on the referenced cases, which in turn shapes the decision ultimately reached to look like those cases rather than as something entirely new.

The lawyer's need to provide redundancy through as much case law support as possible for the lawyer's argument leads to cross-citation among jurisdictions, even when the decisions of a court in one jurisdiction have, even under the strictest rules of precedent, no binding authority on a court in another jurisdiction. Yet the practice of cross-citation further homogenizes the legal policy at issue across jurisdictions. Thus, the norms of stare decisis (i.e., finding support for a proposed decision in prior decisions) communicates from one court to others what the first court has done. Shapiro observes that the "survival of stare decisis, particularly in 'common law' areas of law, as the dominant mode of legal discourse" reflects the redundancy of communication it represents, assisting judges in choosing among a wide range of options in a way that results in incremental policy change (1972, 133). "Stare decisis does not yield single correct solutions" (133) but remains relevant because of its communicative aspects.

Shapiro believes that this trilogy constitutes a kind of general theory of stare decisis that he should have fashioned into a book (letter to author, October 18, 1999). One might speculate on what the book might have looked like as part of his institutional approach to political jurisprudence. On the theoretical side, the central aspect of *Stare Decisis, Policy-Making, and the Courts*—my speculative title for this unwritten book—would have emphasized the indeterminate nature of stare decisis. That is, stare decisis would be of limited use in predicted outcomes of particular cases; Shapiro clearly would express little surprise or distress over the findings of Segal, Spaeth, and Brenner (Brenner and Spaeth 1995; Segal and Spaeth 1996, 1999) that justices of the Supreme Court are unlikely to feel bound by precedents in the mechanical way of legal positivism. At the same time, Shapiro's theory would have emphasized the central role of stare decisis in the decisional process and in the communication of what the law demands of judges deciding the law and of those subject to the law. Just as I regularly tell

students that the fact that there is no right answer to a question does not mean that there are no wrong answers, *stare decisis* points the way for decision makers concerning possible acceptable outcomes. The incrementalism of *stare decisis* allows for change, but only in small steps. The emphasis in *Stare Decisis, Policy-Making, and the Courts* would be on how similar this process is in key respects to policy-making by other governmental institutions.

These three articles provide Shapiro's most complete analysis of the private law area of torts. The first essay of the trilogy reappeared in his major book on administrative process, *The Supreme Court and Administrative Agencies* (1968b), so it is clear that he had thought about the incrementalist approach to *stare decisis vis-à-vis* administrative law. Most likely, the explication of the incrementalist approach in the unwritten *Stare Decisis, Policy-Making, and the Courts* would have included a revised version of his analysis of tort law plus case studies from administrative law, statutory interpretation, and constitutional law; he touches on the area of obscenity in the first article in the trilogy, and a significant discussion of this area of jurisprudence would have reflected his long-standing interest in First Amendment issues (his dissertation was on this topic and eventually was published as Shapiro 1966).

#### CONCLUSION: INSTITUTIONALISM AND THE LEGACY OF MARTIN SHAPIRO

While Shapiro's institutional analyses of courts are regularly cited by persons working in the new institutionalist mode, few authors take the time to consider in depth the ways in which Shapiro anticipated the analytic developments that were to come. His articulation of political jurisprudence as well as his applications of that core concept provide the foundation for the kinds of broad understandings today's institutionalist analysts advance.

The failure to pay detailed attention to some of Shapiro's core insights has had important implications that underlie some of the more heated recent debates among law and politics scholars. A good example is the ongoing dialogue over whether anything more than attitudes matters in understanding Supreme Court decision making. One can easily imagine what a contribution from Shapiro to this debate would look like. He would acknowledge the importance of the justices' political preferences and would applaud the proponents of the attitudinal model for embedding their argument firmly in the Court's institutional

setting. Conversely, he would reject the simplistic portrayal of *stare decisis* found in much of the work showing that justices act on their own preferences rather than on precedent when the two conflict. He would argue that *stare decisis* does not bind justices to precedent but rather creates an expectation that the justices will change and develop law incrementally, relying on precedents for information on where the law is and how it has been moving.

Even more important than what Shapiro might say about specific conceptual debates would be his view that the study of courts through the lens of political jurisprudence must involve both the political and the jurisprudential. This means that analysts must be attentive to the political context and the political influences that operate on judges, justices, and courts and to the jurisprudence—the content of what judges and justices say—produced by the courts. This content is central for understanding how judges and justices affect one another as well as how they affect other political actors. Appellate decisions, while often involving elements of rationalization, provide the primary guidance for future action. As shown by the example of the *Oncale* decision discussed earlier in this chapter, what the justices say in their opinions is likely to be more important in the long run than what they do in terms of who wins and who loses the case. Furthermore, as Shapiro so clearly demonstrates in his work, the opinions provide a window onto the justices' struggles in trying to develop logical approaches to the issues presented to them. Because of both the norm of explanation and the need to provide guidance for future actions, the expectations of judicial opinions force justices to explain and defend their courses of action, particularly on collegial courts where dissents are possible.

More generally, even though the term *political jurisprudence* pops up only occasionally in day-to-day discourse among political scientists who study courts, it is clear that this perspective has triumphed. Political scientists have increasingly become concerned about the interaction of courts with other governmental institutions, such as the interaction between the Supreme Court and Congress. In such discussions, the image of the Court is that of one institution of politics interacting with another. The best of such discussions focus on both the political and jurisprudential elements of the Court's role (Epstein and Kobylka 1992; Melnick 1983, 1994; Pickerill 2000).

One might ask why, if political jurisprudence has taken over, do we not find Shapiro's work cited more often? I think that there are probably two reasons for this. First, political jurisprudence has become so dominant that it is effectively taken for granted. To the extent that one

can say that there is an analytic paradigm guiding the study of courts by U.S.-trained political scientists, that paradigm is political jurisprudence. Subsumed within political jurisprudence are the other specific theoretical approaches: attitudinal, strategic, interest group theory, small-group theory, systems theory, courts as communities, and so forth. All of these approaches look at courts as political, and the best of the analyses within each approach consider the ways in which jurisprudential issues interact with politics to make courts into courts.

The second reason that Shapiro's influence has been more implicit than explicit is that he focused on a theoretical idea rather than a methodology for analysis. One can argue that the more behavioralist approaches to political jurisprudence came to dominate the institutionalist approaches because the behavioralists applied methods that were relatively easy to teach and apply. Graduate students could be trained to do Guttman scaling, factor analysis, regression, and so on, and the Interuniversity Consortium for Political Research (as it was originally known) provided a vehicle for the distribution of data to be plugged into these methodologies. The statistical methods applied by judicial behavioralists were the same as the methods being applied by other quantitatively oriented political scientists. In contrast, institutionalists have had more of a struggle to identify a method and to communicate that method to the broad community studying U.S. (and comparative) politics; particularly for those studying appellate courts, even the qualitative methods that became standard in the study of institutions such as Congress (e.g., "soaking and poking"; see Fenno 1990), were not available or were extremely difficult to carry out (for exceptions, see Howard 1981; Perry 1991).

One must wonder, however, whether Shapiro's explicit impact on judicial politics would have been greater if he had devoted more effort to working directly with data. Much of his analytic work draws on the opinions of judges and justices; little of his work involves collecting or working with other kinds of data. What if Shapiro had undertaken a study involving extensive interviews with persons who had worked as clerks for Supreme Court justices? What if he had spent significant time talking to mid- to senior-level officials in key administrative agencies, asking about their attentiveness to actual and potential court decisions? Some scholars complain that other people who write about Congress have "never actually met a datum," meaning that these scholars produce work from a distance, drawing largely on roll call voting data or published committee reports. To a significant degree, one might wonder with regard to Shapiro's work how much more interesting and

still more influential it might have been if he had directly interacted with the judges and officials about whom he wrote.

Ideas are the core of what we as political scientists argue about, and Shapiro has been a source of many important ideas for scholars of the judiciary. The more deeply I have looked at Shapiro's work, the more I have realized how many of the ideas that have influenced my work on courts and actors within the courts can be traced to Shapiro's insights. Yet most of those influences on my work have been largely indirect. By the time I arrived in graduate school, the more behavioralist element had taken a fairly solid hold of empirical work on the Supreme Court. The core overview text that was assigned in my graduate judicial process class was Murphy and Tanenhaus's *The Study of Public Law* (1972), which has but a single explicit mention of Shapiro and political jurisprudence (in the concluding chapter). Yet a reexamination of that book clearly illustrates that the idea of political jurisprudence was inherent in the text. Still, the institutionalists explicitly working at the lower-court level had the most influence on my work: Kenneth Dolbeare (Dolbeare 1969; Dolbeare and Hammond 1968, 1971), Richard Richardson (Richardson and Vines 1970), and, most importantly, Herbert Jacob (1965; 1967; 1969; 1973). In retrospect, I see much cross-influence between the work of these scholars and Shapiro's political jurisprudence. Shapiro's call for more subtle analysis of the role of courts as political agencies was heeded in the work of scholars writing about the lower courts or the impact of the Supreme Court on other political actors. Institutional analyses of the Supreme Court's decision-making process were largely nonexistent during the 1970s and 1980s.

The rediscovery of the power of institutional analysis was the major development in the study of judicial politics in the 1990s, and central to the interpretivist strand of this work were the ideas underlying political jurisprudence. Less clear is political jurisprudence's influence on the positive theory of institutions strand. In fact, political jurisprudence should be important for any institutional analysis of courts, whether interpretivist or game theoretic: when one speaks of courts' "legislative," "administrative," or "representative" role, political jurisprudence contends that these roles must be understood to function within constraints imposed by jurisprudential expectations. Courts legislate, but that does not make them legislatures; courts administer, but that does not make them administrators. Courts are courts. Courts must respect limits created by attention to jurisprudence. However, courts are political, and the combination of the political and the jurisprudential makes courts what they are. This is the contribution and legacy of Martin Shapiro.

## NOTES

1. In electronic correspondence with Howard Gillman (dated June 22, 2000), Shapiro observed that the publication date of *Law and Politics in the Supreme Court* might make it appear to be a product of his graduate training at Harvard; in fact, he describes it as a "reaction to [his] graduate training." The contract for the book came as a result McCloskey's urging the editor at the Free Press to give Shapiro a contract to write a book about the Supreme Court. Only after the contract was signed did Shapiro begin to formulate his ideas about the book's specific content, and only after he had developed the arguments for the *Kentucky Law Journal* piece did the book's argument crystallize.

2. Shapiro defines sociological jurisprudence as the view that "law must be understood not as an independent organism but as an integral part of the social system" (1964b, 294). In fact, in his correspondence with Howard Gillman in connection with the essay in this volume about Robert McCloskey, Shapiro reports that the title of this essay arose because Kentucky was doing a symposium on jurisprudence, had lined up Gilbert Geis to write about sociological jurisprudence (1964), and approached Shapiro to write about jurisprudence from the viewpoint of political science; he agreed and said he would "do political jurisprudence" even though at that point he was not sure what he meant by the term.

3. While this argument is developed most clearly in Shapiro 1964a, the seeds of it can be found in Shapiro 1962. This article became the core of the first chapter of Shapiro 1966, the book based on his dissertation. The basic argument advanced in this work before the political jurisprudence articles is that the Supreme Court is a political institution making political choices through which it creates frameworks for analysis to be used by lower courts and other political actors. Central to this argument is the need to place the Court in its "actual political environment" (1962, 31). More broadly, Shapiro's analysis is an effort to place judicial review within the broader framework of group theory that was dominant during the 1950s and 1960s and was reflected in the work of Bentley, Truman, Latham, and Dahl. One does not find the phrase *political jurisprudence* in Shapiro 1966, but the book can be read as a work of "political jurisprudence."

4. While the newness of empirical studies of judicial decision making may be said to account for the attacks on Shapiro's work, one still sees such attacks today. For example, Judge Harry Edwards described two empirical studies of the D.C. Circuit, on which he serves, as "the heedless observations of academic scholars who misconstrue and misunderstand the work of judges" (1998, 1335).

5. While the Court can discover issues not presented by the parties, this appears to be relatively rare (Epstein, Segal, and Johnson 1996; McGuire and Palmer 1995, 1996; Palmer 1999).

6. This grouping was sometimes referred to as "iron triangles" (Safire 2000; Seidman 1970, 37)

7. Shapiro would also point to *Baker v. Carr* as an example of another Court strength: it can act in situations where other government agencies' direct interests in the issue make it impossible for those other agencies to act (1964a, 241).

8. Although Shapiro 1966 was his second published book, Shapiro 1968b is the second book devoted to political jurisprudence. The phrase *political jurisprudence* does not appear in the index to Shapiro 1966.

9. The success of agencies before the Supreme Court is clear: between 1946 and 1994, federal agencies have won 70 percent of the Supreme Court cases in which they were parties (Epstein et al. 1996, 636). This phenomenon has been widely discussed in the judicial politics literature (Canon and Giles 1972; Crowley 1987; Handberg 1979; Kilwein and Brisbin 1996; Sheehan 1990, 1992; Tanenhaus 1960). Interestingly, it appears that agencies have had somewhat less success before the U.S. Court of Appeals, winning only 58 percent of cases between 1969 and 1988 (Humphries and Songer 1999, 215).

10. This idea has been extensively developed in the literature on procedural justice (see Lind and Tyler 1988; Tyler 1990, 1994).

11. This is not to say that comparative judicial work in political science was unknown before Shapiro's book (see, e.g., Becker 1970; Kommers 1975; Morrison 1974; Schubert and Danelski 1969; Tate 1975; Wenner, Wenner, and Flango 1978); in fact, the earliest work on comparative constitutional law by a political scientist was published more than one hundred years ago (Burgess 1890-91). However, the work was relatively obscure except to the small group of people doing it.

12. This can be overstated. Gavin Drewry, one of the coauthors of a book on the House of Lords (Blom-Cooper and Drewry 1972), was a political scientist. However, other major works advancing political analyses of English courts were largely written by legal academics or sociologists (Abel-Smith and Stevens 1967; Griffith 1977; Paterson 1982; Paterson 1974; Stevens 1978), not by political scientists.

13. Shapiro had previously developed his argument about the political role of appeal in Shapiro 1980.

14. *Judicial review* refers to the general idea of courts reviewing government actions broadly defined, not simply reviewing the constitutionality of legislative enactments, which is the way the term is typically used in discussions of American courts.

15. For the appellate courts, the appointments are by the Crown based on recommendations by the prime minister, but the prime minister relies on the lord chancellor in making these recommendations.

16. This hierarchical promotion system existed well before Shapiro had even thought about writing *Courts* (see Karlen 1963, 120).

17. The article later reappeared as part of chapter 1 of Shapiro 1968b. The article's importance at the time is reflected in its inclusion in the old Bobbs-Merrill Reprint Series in Political Science (no. 554).

18. Writing just before the radical growth in law school enrollments,

Shapiro also points to the dominance of one or two tort teachers within specific jurisdictions. As an example, he points to a teacher at the University of Texas who held his post for many years and instructed a generation of Texas practitioners. That type of dominance is probably less common today, with the increased number of law schools and the growth in the number of students enrolled at each, requiring the employment of multiple teachers for each subject.

## REFERENCES

- Abe, Masaki. 1995. "The Internal Control of a Bureaucratic Judiciary: The Case of Japan." *International Journal of the Sociology of Law* 23:303-20.
- Abel-Smith, Brian, and Robert Stevens. 1967. *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965*. Cambridge: Harvard University Press.
- Becker, Theodore L. 1970. "Comparative Judicial Politics: The Political Functionings of Courts." Chicago: Rand McNally.
- Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis: Bobbs-Merrill.
- Blom-Cooper, Louis, and Gavin Drewry. 1972. *Final Appeal: A Study of the House of Lords in Its Judicial Capacity*. Oxford: Clarendon.
- Braybrooke, David, and Charles E. Lindblom. 1963. *A Strategy of Decision: Policy Evaluation as a Social Process*. New York: Free Press of Glencoe.
- Brenner, Saul, and Harold J. Spaeth. 1995. *Stare Indecisus: The Alteration of Precedent on the Supreme Court, 1946-1992*. New York: Cambridge University Press.
- Brent, James C. 1999. "An Agent and Two Principals: U.S. Court of Appeals Responses to *Employment Division, Department of Human Resources v. Smith* and the Religious Freedom Restoration Act." *American Politics Quarterly* 27 (2):236-68.
- Burgess, John William. 1890-91. *Political Science and Comparative Constitutional Law*. Boston: Ginn.
- Canon, Bradley C., and Michael Giles. 1972. "Recurring Litigants: Federal Agencies before the Supreme Court." *Western Political Quarterly* 25:183-91.
- Clayton, Cornell W., and Howard Gillman, eds. 1999. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Cox, Archibald. 1975. *The Role of the Supreme Court in American Government*. New York: Oxford University Press.
- Crowley, Donald W. 1987. "Judicial Review of Administrative Agencies: Does the Type of Agency Matter?" *Western Political Quarterly* 40:265-83.
- Cyert, Richard M., and James G. March. 1963. *A Behavioral Theory of the Firm*. Englewood Cliffs, N.J.: Prentice-Hall.
- Dahl, Robert. 1957. "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6:279-95.
- Dolbeare, Kenneth M. 1969. "The Federal District Courts and Urban Public Policy: An Exploratory Study, 1960-1967." In *Frontiers of Judicial Research*, ed. J. Grossman and J. Tanenhaus. New York: John Wiley.
- Dolbeare, Kenneth M., and Phillip E. Hammond. 1968. "The Political Party Bias of Attitudes toward the Supreme Court." *Public Opinion Quarterly* 32:16-30.
- Dolbeare, Kenneth M., and Phillip E. Hammond. 1971. *The School Prayer Decisions: From Court Policy to Local Practice*. Chicago: University of Chicago Press.
- Edwards, Harry. 1998. "Collegiality and Decision Making on the D.C. Circuit." *Virginia Law Review* 84:1335-70.
- Epp, Charles E. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.
- Epstein, Lee, and Joseph F. Kobylka. 1992. *The Supreme Court and Legal Change: Abortion and the Death Penalty*. Chapel Hill: University of North Carolina Press.
- Epstein, Lee, Jeffrey A. Segal, and Timothy Johnson. 1996. "The Claim of Issue Creation on the U.S. Supreme Court." *American Political Science Review* 90:845-52.
- Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 1996. *The Supreme Court Compendium: Data, Decisions, and Developments*. 2d ed. Washington, D.C.: Congressional Quarterly Press.
- Epstein, Lee, and Thomas G. Walker. 1995. "The Role of the Supreme Court in American Society: Playing the Reconstruction Game." In *Contemplating Courts*, ed. L. Epstein. Washington, D.C.: Congressional Quarterly Press.
- Esckridge, William N., Jr. 1991a. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101:331-456.
- Esckridge, William N., Jr. 1991b. "Reneging on History? Playing the Court/Congress/President Civil Rights Game." *California Law Review* 79:613-84.
- Farole, Donald J., Jr. 1999. "Reexamining Litigant Success in State Supreme Courts." *Law and Society Review* 33:1043-57.
- Fenno, Richard F. 1990. *Watching Politicians: Essays on Participant Observation*. Berkeley: Institute of Governmental Studies, University of California.
- Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead." *Law and Society Review* 9:95.
- Geis, Gilbert. 1964. "Sociological Jurisprudence: Admixture of Lore and Law." *Kentucky Law Journal* 52:267-93.
- Gillman, Howard, and Cornell W. Clayton, eds. 1999. *The Supreme Court in American Politics: New Institutional Interpretations*. Lawrence: University Press of Kansas.

- Greenburg, Jan Crawford. 1999. "Sex Suit Fallout Alarms Its Advocates." *Chicago Tribune*, August 2, 1, 7.
- Griffith, J. A. G. 1977. *The Politics of the Judiciary*. Manchester: Manchester University Press.
- Handberg, Roger. 1979. "The Supreme Court and Administrative Agencies, 1965-1978." *Journal of Contemporary Law* 6:161-76.
- Hecko, Hugh. 1978. "Issue Networks and the Executive Establishment." In *The New American Political System*, ed. A. King. Washington, D.C.: American Enterprise Institute.
- Holland, Kenneth M., ed. 1991. *Judicial Activism in Comparative Perspective*. New York: St. Martin's Press.
- Howard, J. Woodford, Jr. 1981. *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*. Princeton: Princeton University Press.
- Humphries, Martha Anne, and Donald R. Songer. 1999. "Law and Politics in Judicial Oversight of Federal Administrative Agencies." *Journal of Politics* 61 (1):207-20.
- Jackson, Donald W., and C. Neal Tate, eds. 1993. *Judicial Review and Public Policy*. New York: Greenwood Press.
- Jacob, Herbert. 1965. *Justice in America*. Boston: Little, Brown.
- Jacob, Herbert. 1967. *Law, Politics, and the Federal Courts*. Boston: Little, Brown.
- Jacob, Herbert. 1969. *Debtors in Court: The Consumption of Government Services*. Chicago: Rand McNally.
- Jacob, Herbert. 1973. *Urban Justice: Law and Order in American Cities*. Englewood Cliffs, N.J.: Prentice-Hall.
- Jacob, Herbert, Erhard Blankenburg, Herbert M. Kritzer, Doris Marie Provine, and Joseph Sanders. 1996. *Courts, Law, and Politics in Comparative Perspective*. New Haven: Yale University Press.
- Karlen, Delmar. 1963. *Appellate Courts in the United States and England*. Westport, Conn.: Greenwood Press.
- Kenny, Sally J., William M. Reisinger, and John C. Reitz, eds. 1999. *Constitutional Dialogues in Comparative Perspective*. New York: St. Martin's Press.
- Kilwein, John C., and Richard A. Brisbin Jr. 1996. "Supreme Court Review of Federal Administrative Agencies." *Judicature* 80:130-37.
- Knight, Jack, and Lee Epstein. 1996. "On the Struggle for Judicial Supremacy." *Law and Society Review* 30:87-120.
- Kommers, Donald P. 1975. *Judicial Politics in West Germany: A Study of the Federal Constitutional Courts*. Beverly Hills, Calif.: Sage.
- Lafon, Jacqueline Lucienne. 1991. "The Judicial Career in France: Theory and Practice under the Fifth Republic." *Judicature* 75:97-106.
- Levi, Edward H. 1961. *An Introduction to Legal Reasoning*. Chicago: University of Chicago Press.
- Lind, E. Allan, and Tom Tyler. 1988. *The Social Psychology of Procedural Justice*. New York: Plenum.

- Lindblom, Charles E. 1959. "The Science of 'Muddling Through.'" *Public Administration Review* 19:79-88.
- Llewellyn, Karl N. 1960. *The Common Law Tradition—Deciding Appeals*. Boston: Little, Brown.
- Lowi, Theodore J. 1969. *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority*. New York: W. W. Norton.
- Malleson, Kate. 1997. "Judicial Training and Performance Appraisal: The Problem of Judicial Independence." *Modern Law Review* 60:655-67.
- Marks, Brian A. 1989. "A Model of Judicial Influence on Congressional Policymaking: *Grove City v. Bell*." Ph.D. diss., Washington University, St. Louis.
- McGuire, Kevin T., and Barbara Palmer. 1995. "Issue Fluidity on the U.S. Supreme Court." *American Political Science Review* 89:691-702.
- McGuire, Kevin T., and Barbara Palmer. 1996. "Issues, Agendas, and Decision Making on the Supreme Court." *American Political Science Review* 90:853-65.
- Melnick, R. Shep. 1983. *Regulation and the Courts: The Case of the Clean Air Act*. Washington, D.C.: Brookings Institution.
- Melnick, R. Shep. 1994. *Between the Lines: Interpreting Welfare Rights*. Washington, D.C.: Brookings Institution.
- Melnick, R. Shep. 1995. Review of *Dynamic Statutory Interpretation*, by William N. Eskridge. *Georgetown Law Journal* 84:91-121.
- Mezey, Susan Gluck. 1988. *No Longer Disabled: The Federal Courts and the Politics of Social Security Disability*. New York: Greenwood Press.
- Mishkin, Paul. 1965. "Foreword." *Harvard Law Review* 79:56-102.
- Morrison, Fred. 1974. *Courts and the Political Process in England*. Beverly Hills, Calif.: Sage.
- Murphy, Walter F., and Joseph Tanenhaus. 1972. *The Study of Public Law*. New York: Random House.
- Palmer, Barbara. 1999. "Issue Fluidity and Agenda Setting on the Warren Court." *Political Research Quarterly* 52 (1): 39-65.
- Paterson, Alan. 1974. "Judges: A Political Elite?" *British Journal of Law and Society* 1:118-35.
- Paterson, Alan. 1982. *The Law Lords*. London: Macmillan.
- Perry, H. W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press.
- Pickerill, J. Mitchell. 2000. "Congress and Constitutional Deliberation: The Role of Judicial Review in a Separated System." Ph.D. diss., University of Wisconsin, Madison.
- Pritchett, C. Herman. 1948. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*. New York: Macmillan.
- Richardson, Richard J., and Kenneth N. Vines. 1970. *The Politics of Federal Courts*. Boston: Little, Brown.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring about Social Change?* Chicago: University of Chicago Press.
- Safire, William. 2000. "On Language: Iron Triangle." *New York Times Magazine*, March 12, 34.

- Schubert, Glendon A., and David J. Danelski, eds. 1969. *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West*. New York: Oxford University Press.
- Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91:28-44.
- Segal, Jeffrey A., and Harold J. Spaeth. 1996. "The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices." *American Journal of Political Science* 40:971-1003.
- Segal, Jeffrey A., and Harold J. Spaeth. 1999. *Majority Rule or Minority Will: Adherence to Precedent in the U.S. Supreme Court*. New York: Cambridge University Press.
- Seidman, Harold. 1970. *Politics, Position and Power*. New York: Oxford University Press.
- Shapiro, Martin. 1962. "Judicial Modesty, Political Reality and Preferred Position." *Cornell Law Quarterly* 47: 175-204.
- Shapiro, Martin. 1964a. *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*. New York: Free Press of Glencoe.
- Shapiro, Martin. 1964b. "Political Jurisprudence." *Kentucky Law Journal* 52: 294-345.
- Shapiro, Martin. 1965. "Stability and Change in Judicial Decision-Making: Incrementalism or *Stare Decisis*?" *Law in Transition Quarterly* 2: 134-57.
- Shapiro, Martin. 1966. *Freedom of Speech: The Supreme Court and Judicial Review*. Englewood Cliffs, N.J.: Prentice-Hall.
- Shapiro, Martin. 1968a. "Decentralized Decision-Making in the Law of Torts." In *Political Decision Making*, 44-75, ed. S. Sidney Ulmer. New York: Van Nostrand Reinhold.
- Shapiro, Martin. 1968b. *The Supreme Court and Administrative Agencies*. New York: Free Press.
- Shapiro, Martin. 1972. "Toward a Theory of *Stare Decisis*." *Journal of Legal Studies* 1:125-34.
- Shapiro, Martin. 1980. "Appeal." *Law and Society Review* 14:629-61.
- Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press.
- Sheehan, Reginald S. 1990. "Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes." *Western Political Quarterly* 43:875-85.
- Sheehan, Reginald S. 1992. "Federal Agencies and the Supreme Court: An Analysis of Litigation Outcomes, 1953-1988." *American Politics Quarterly* 20:478-500.
- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38:673-96.
- Songer, Donald R., Reginald S. Sheehan, and Susan Brodie Haire. 1999. "Do the 'Haves' Come out Ahead over Time? Applying Galanter's Framework to the Decisions of the U.S. Courts of Appeals, 1925-1988." *Law and Society Review* 33:811-32.
- Spaeth, Harold J., and Jeffrey A. Segal. 1999. *Majority Rule or Minority Will: Adherence to Precedence on the U.S. Supreme Court*. New York: Cambridge University Press.
- Stevens, Robert. 1978. *Law and Politics: The House of Lords as a Judicial Body, 1800-1976*. Chapel Hill: University of North Carolina Press.
- Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press.
- Sunkin, Maurice. 1993. "The Incidence and Effect of Judicial Review Procedures against Central Government in the United Kingdom." In *Judicial Review and Public Policy*, ed. D. W. Jackson and C. N. Tate. New York: Greenwood Press.
- Tanenhous, Joseph. 1960. "Supreme Court Attitudes toward Federal Administrative Agencies." *Journal of Politics* 22:502-24.
- Tate, C. Neal. 1975. "Paths to the Bench in Britain: A Quasi-Experimental Study of the Recruitment of a Judicial Elite." *Western Political Quarterly* 28:108-29.
- Tate, C. Neal, and Torbjörn Vallinder. 1995. "The Global Expansion of Judicial Power: The Judicialization of Politics." In *The Global Expansion of Judicial Power*, ed. C. N. Tate and T. Vallinder. New York: New York University Press.
- Truman, David. 1951. *The Governmental Process: Political Interests and Public Opinion*. New York: Knopf.
- Tyler, Thomas R. 1990. *Why People Obey the Law*. New Haven: Yale University Press.
- Tyler, Thomas R. 1994. "Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government." *Law and Society Review* 28:809-32.
- Wechsler, Herbert. 1959. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73:1-35.
- Wenner, Manfred, Lettie M. Wenner, and Victor E. Flango. 1978. "Austrian and Swiss Judges: A Comparative Study." *Comparative Politics* 10:499-519.
- Wildavsky, Aaron. 1964. *Politics of the Budgetary Process*. Boston: Little, Brown.