
Book Review: The Judicial Mind Revisited, by Glendon Schubert

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Book Reviews

THE JUDICIAL MIND REVISITED, GLENDON SCHUBERT, New York: Oxford University Press. 1974. Pp. 183. (Hardbound: \$9.00; Paperback: \$4.95).

Dramatic new perspectives on and approaches to the study of public law have evolved over the past several years, drawing upon and owing much to the analyses and insights provided by "sociological" jurisprudential thinking of an earlier period and an increasingly interdisciplinary emphasis in research. Martin Shapiro has argued that "a new movement" can be discerned in the recent scholarly activities of some academics, a movement which he chooses to call "political jurisprudence".¹

Briefly, political jurisprudence conceptualizes law and the legal process as an integral subcomponent of the overall sociopolitical system. More concretely, the legal process is perceived as a political process, and those individuals and groups acting within it — legislators, lawyers, and judges — are perceived as political actors. The goal, according to Shapiro,

. . . is to intellectually integrate the judicial system into the matrix of government and politics in which it actually operates and to examine courts and judges as participants in the political process, rather than presenting law, with a capital L, as an independent area of substantive knowledge. Quite fundamentally, political jurisprudence subordinates the study of law, in the sense of a concrete and independent system of prescriptive statements, to the study of man, in this instance those men who fulfill their political functions by the creation, application and interpretation of law.²

No single individual has made a more substantial contribution to the study of a specific subgroup of the latter — the justices of the U.S. Supreme Court — than political scientist Glendon Schubert. His research orientation for well over a decade has been to investigate the linkages between the attitudinal and ideological predispositions of judges and their decisional behaviour as first suggested by the judicial realists, but in highly general, unsystematic terms. Schubert began by suggesting a range of behavioural methods for studying judicial decision-making which included Pritchett's bloc analysis,³ Guttman scalograms, varieties of content analysis, and game theory.⁴ He

¹ M. Shapiro, *Political Jurisprudence* (1964), 52 Ky.L.J. 294.

² *Id.* at 297.

³ C. H. Pritchett, *The Roosevelt Court: A Study of Judicial Politics & Values, 1937-1947* (New York: Octagon Books, 1948).

⁴ G. Schubert, *The Study Of Judicial Decision-Making As An Aspect Of Political Behaviour* (1958), 52 American Political Science Rev. 1007.

subsequently published a comprehensive review of procedural rules for judicial behaviour research.⁵ Schubert's informed and articulate call for the serious application of the concepts and methods of the behavioural sciences to the study of judicial decision-making has been accompanied by a personal research contribution of remarkable proportions.⁶

The most comprehensive single report of Schubert's work came in 1965 with the publication of *The Judicial Mind*⁷ in which his most significant conceptual and methodological contributions to the study of judicial behaviour are to be found. Here, Schubert painstakingly laid out the logic of treating judicial votes as indicators of underlying attitudes and orientations and the available methods for operationally identifying patterns of such attitudes. He began with the basic concept of stimulus-response points (cases and decisions, respectively) in a hypothetical psychological space. This space was seen to be "penetrated" by distinct attitudinal dimensions which could, in principle, be located operationally through the use of factor analysis (to discover patterns of decisions) and cumulative Guttman scaling (to place judges relative to one another on the identified attitudinal dimensions). Schubert subjected his psychometric model to empirical testing in *The Judicial Mind* by examining decisions of the U.S. Supreme Court from 1946-1963 and demonstrated the analytical utility of his conceptualization of judicial ideology and its relationship to judicial decisions. Here, Schubert shows that, in his words

My most general conclusion is that during all except the most recent of the seventeen terms studied, the attitudinal differences of Supreme Court justices toward political and economic issues have reflected the para-ideological division of the justices between a minority of liberals and a majority of conservatives; and since the conservatives, but not the liberals, were further divided ideologically between pragmatists and dogmatists, the more cohesive and intense ideology of the liberal minority tended to be the dominant ideology of the court throughout the latter half of the period of this study.⁸

Schubert's most recent publication, quite aptly titled *The Judicial Mind Revisited*,⁹ is familiar territory for readers of his earlier work, but is remarkable nonetheless. Social scientists unfailingly give lip-service to numerous procedural canons, including the notions that the details of research (as well

⁵ G. Schubert, *Quantitative Analysis of Judicial Behaviour* (Glencoe: The Free Press, 1959).

⁶ For example, see G. Schubert, *A Solution to the Indeterminate Factorial Resolution of Thurstone and Degan's Study of the Supreme Court* (1962), 7 *Behavioural Science* 448; *1960 Term of the Supreme Court: A Psychological Analysis* (1962), 56 *American Political Science Rev.* 90; *Behavioural Research in Public Law* (1963), 57 *American Political Science Rev.* 433; *Judicial Attitudes and Voting Behaviour: The 1961 Term of the U.S. Supreme Court* (1963), 28 *Law and Contemporary Problems* 100; *Jackson's Judicial Philosophy: An Exploration in Value Analysis* (1965), 59 *American Political Science Rev.* 940; *Ideologies and Attitudes, Academic and Judicial* (1967), 29 *Journal of Politics* 3.

⁷ G. Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963* (Evanston: Northwestern University Press, 1965).

⁸ *Id.* at 272.

⁹ G. Schubert, *The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology* (New York: Oxford University Press, 1974).

as findings) ought to be public in every sense; that conceptual frameworks and schemes ought to be subjected to multiple tests before any confirmation can justifiably be claimed; and that social research must be cumulative if it is to be useful. Far too infrequent are examples of researchers actually attempting to observe these prescriptions with the vigour of Glendon Schubert in this latest book. He carefully traces the development of his early work with psychometric modelling and critically points up its conceptual and methodological shortcomings. He reviews his theory of judicial ideology (which remains intact from the earlier study) and proceeds to retest the psychometric model drawn from it through an analysis of the just under 2,500 non-unanimous U.S. Supreme Court decisions handed down in the 1946-1969 period. But Schubert has gone beyond simply expanding his data base. He employs three distinctive multivariate techniques (principle components analysis, oblique factor analysis, and smallest space analysis) in order to identify empirically the structural characteristics of the Supreme Court data as a means of reassessing his theoretical model's utility. Schubert finds that two of the dimensions reported in the original study (liberalism and conservatism) are manifest without regard to the multidimensional technique used. A third factor, however, appears to have been an artifact of the original data and/or the centroid factor analysis routine by which it was identified.

On the basis of his updated analysis, Schubert's earlier work is largely confirmed.¹⁰ There remains, however, the same degree of slippage between theory and data. That is, for all the conceptual elegance evident in the mapping of psychometric space using actual data (and it is certainly considerable), the precise linkages between ideological dimensions and votes cast remain unclear. This hardly diminishes Schubert's contribution; rather, it points to the analytic problem toward which subsequent research energies ought to be directed.¹¹

Clearly, elaborations of the psychometric approach hold considerable promise for research into decision-making in a range of settings. It should be noted that while the substantive focus of the bulk of his own work has been the U.S. Supreme Court, Schubert has long contended that his theoretical framework

. . . is generalizable, and that with appropriate methodological modifications, it should be possible to replicate my findings about United States Supreme Court justices by similar studies of judges of other courts. Indeed, I assume that the theory of attitudes to be presented here rests upon even more fundamental commonalities in human behavior, and that it should be applicable to the decision-making behavior of persons acting in adjudicatory roles in private as well as public social structures and irrespective of their formal status as 'judges'.¹²

This expectation of broader applicability for his approach has been borne out in a number of studies which look at judicial bodies in a range of non-

¹⁰ *Id.* at 145.

¹¹ *Id.* at 141.

¹² *Supra*, note 7 at 20.

American national settings, including Canada.¹³ While it is undoubtedly true that the courts studied in much of this research occupy a sometimes dramatically different position in the overall social and political processes of their respective nations, the recognition and analysis of them and their personnel as *political* actors is essential for our understanding of these societies. The stimulus provided by Glendon Schubert in the area of comparative judicial research is a very substantial one.

A central area of concern for researchers in political jurisprudence is to . . . devis[e] a methodology that will allow them to refine and systematize the impressionistic insights of the realists by isolating and measuring the strength and direction of judicial attitudes and relating them to the actual patterns of decision.¹⁴

It is essential that anyone wishing to become familiar with this key area of political jurisprudence carefully read the work of Glendon Schubert. Because it is cumulative, provides historical perspective of the development of Schubert's research, and is quite clearly presented (despite the fact that it is at times rather technical). *The Judicial Mind Revisited* provides an excellent starting place.

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¹³ See Donald E. Fouts, "Policy-Making in the Supreme Court of Canada, 1950-1960"; and Sidney R. Peck, "A Scalogram Analysis of the Supreme Court of Canada, 1958-1967", both in G. Schubert and D. Danelski (eds.), *Comparative Judicial Behaviour: Cross-Cultural Studies of Political Decision-Making in the East and West* (New York: Oxford University Press, 1969). Also see G. Adams and P. Cavalluzzo, *The Supreme Court of Canada: A Biographical Study* (1969), 7 Osgoode Hall L. J. 61.

¹⁴ Shapiro, *supra*, note 1 at 295.