

# Michigan Law Review

---

Volume 59 | Issue 4

---

1961

## Schubert: Constitutional Politics, Schmidhauser: The Supreme Court, McClosky: The American Supreme Court

Paul G. Kauper  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Legal Writing and Research Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Paul G. Kauper, *Schubert: Constitutional Politics, Schmidhauser: The Supreme Court, McClosky: The American Supreme Court*, 59 MICH. L. REV. 659 (1961).

Available at: <https://repository.law.umich.edu/mlr/vol59/iss4/18>

This Book Reviews is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

CONSTITUTIONAL POLITICS. By *Glendon A. Schubert*. New York: Holt, Rinehart and Winston, Inc. 1960. Pp. xvi, 735. \$8.50.

THE SUPREME COURT. By *John R. Schmidhauser*. New York: Holt, Rhinehart and Winston, Inc. 1960. Pp. 163. \$1.50.

THE AMERICAN SUPREME COURT. By *Robert G. McCloskey*. Chicago: University of Chicago Press. 1960. Pp. x, 260. \$5.

The United States Supreme Court, always a subject of great interest, has stimulated an unusually large volume of literary effort during the recent years. Attention has been directed, not only to the trends and movements apparent in its decisions, but even more significantly to the Court's institutional position, to its composition and methods of operation, and to the Court's understanding of its role in exercising the power of judicial review. The controversies about the Court in recent years and the criticisms directed against it, as well as defenses made on its behalf, have all contributed to keep the Court in the public eye and to help generate the spate of books and articles dealing with it.

Professor Schubert's hefty volume, subtitled "The Political Behavior of Supreme Court Justices and the Constitutional Policies That They Make," combines a generous amount of text with a substantial body of case material dealing with selected phases of the Court's adjudications on constitutional issues. Professor Schmidhauser's small paperback volume which deals with the Supreme Court's politics, parallels to some extent the discussion found in Part I of Professor Schubert's book. The author deals with the question of how men get to the Supreme Court and what considerations are taken

into account in their appointment, supplies data on the social and political background of the Justices, discusses the external pressures that operate on the Court, and portrays the internal procedures and customs that help shape the Court's freedom in the decision-making process. Professor McCloskey in his book subjects the Supreme Court and its power of judicial review to critical evaluation. He supplies an overall picture of the Court's exercise of its review power in the successive stages of our constitutional history and in the concluding chapters deals critically with the whole problem of judicial review and the role that the Court should assume for itself.

Each of these books makes a useful contribution. Professor Schubert's book is a book intended for class use and should be especially helpful in the courses in constitutional law and constitutional history taught in political science departments. Although the case material lacks the comprehensiveness and depth of treatment of particular subject matters often found in constitutional law casebooks intended for college use, this deficiency is at least in substantial part compensated for by the extensive introductory notes and comments that the author himself supplies with respect to the case material he has selected for this volume. It must be remembered that Professor Schubert's thesis is that the Supreme Court is a policy-making body and he divides the subject matter of his book, so far as the case material is concerned, into a series of topics that are helpful in developing his thesis. The cases on the whole are well chosen. This reviewer found Part I of Professor Schubert's book to be its most interesting feature and the part that adds the most distinctive value. Entitled "A Behavioral Approach to the Supreme Court," it consists primarily of text matter as well as excerpts quoted from other sources. One section deals with such questions as the staffing of the Supreme Court, the background of the Justices, the considerations that go into the nominations of Justices, the role of the Senate, and the problem of judicial superannuation. The section on the decision-making process in which the author discusses lobbyists before the Supreme Court is particularly interesting. He refers to the use of test cases, propaganda in legal periodicals and the use of *amici curiae* as elements of the lobbying process before the Court. Professor Schubert points out that the NAACP, for instance, because of its participation in many cases involving equal protection, has become one of the most influential lobbyists before the Court. The author makes a point of the dangers involved in the free use of the *amicus curiae* brief as a means of bringing pressure to bear on the Court. The section concerning decision-making on the merits is a very helpful and informative one for the student who has no idea of how the Court goes about its business. Included here is a discussion of the way the Chief Justice performs his important role in the assigning of opinions, the place of the dissenting opinion, and the role of the law clerks in assisting the Justices with their work. While much of this material is not new, it is brought together here in a helpful way. The last section of Part I deals with bloc behavior. Here the author describes the blocs that have appeared

on the Court from time to time in recent years. Referring to the Court in the middle thirties he uses the expression, the "Hughberts Game" to indicate the vital role played by Mr. Chief Justice Hughes and Mr. Justice Roberts in determining which bloc governed on the Court at that time.

With respect to the substance of the Supreme Court's decisions, Professor Schubert is concerned with setting them in a context that makes clear that the Court exercises really a political power, in that judicial appraisal and evaluation of basic policy factors plays a large role in the adjudication of constitutional issues. In stressing this approach the author emphasizes what is now generally recognized, namely, that constitutional decision-making cannot be explained in terms of an objective and disinterested judicial interpretation of "the law" as captured in a text. But on the point raised with respect to the Court's policy-making function, it should also be observed that one of the important policy considerations which is the source of division within the Court at present is how actively or passively the Court should exercise its important power of judicial review at the expense of legislative freedom to determine policy.

The author's own introductory notes and comments relating to the case materials make interesting reading. Professor Schubert writes in a frank, stimulating, and often pungent way. Some of his generalizations respecting the decided cases reveal a superficial analysis. When he suggests, for instance, (p. 536) that the distinction between the *Terminiello* and the *Feiner* cases<sup>1</sup> is that in the former case the Court was concerned to protect a fascist's right of speech, whereas in the latter case it was not concerned with protecting a left-winger's right of free speech, he states a surface conclusion that ignores some vital points of difference between the two cases. In *Terminiello* the defendant was speaking in a private auditorium to a favorable audience, whereas in *Feiner* the police intervened in the situation where the defendant was speaking in the street to a hostile audience. To gloss over and disregard these factual elements that enter into the pragmatic judgment process and to rationalize the results in terms of the Court's predilection for one type of speech over another suggests the risk of employing "judicial predilectionism" as the central canon for interpreting the Supreme Court's decisions. In some of his comments, the author occasionally resorts to a bit of flippant humor as when, in dealing with the *Breithaupt* case<sup>2</sup> and viewing it by reference to the earlier *Rochin* case,<sup>3</sup> the author suggests (p. 680) that the lesson police may learn is that they should beat a prisoner into a state of unconsciousness before using a stomach pump to extract incriminatory materials from his body.

The minor criticisms noted above should not serve to obscure the many good qualities of Professor Schubert's scholarly and well-written book and

<sup>1</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Feiner v. New York*, 340 U.S. 315 (1951).

<sup>2</sup> *Breithaupt v. Abram*, 352 U.S. 432 (1957).

<sup>3</sup> *Rochin v. California*, 342 U.S. 165 (1952).

the useful insights he contributes in interpreting the behavior role of the tribunal which occupies a key role in our governmental power structure.

Professor Schmidhauser's modest volume is for the most part a descriptive study of the Supreme Court. The book does not purport to deal critically with the Court or with the power of judicial review. He deals in the first part with what he calls "the realities of judicial selection." Interesting information is tabulated and presented in regard to such factors as age, education, occupation, religion, prior judicial experience, and the general political and racial background of the men who have been appointed to the Supreme Court. The author makes the point that it was probably intended at the very creation of the Constitution, in giving the President the power to appoint the members of the Supreme Court, that political considerations would play a dominant role in these appointments, and he concludes on the basis of his study that in fact this has been the case. Of course, this has not been invariably true, as Professor Schmidhauser points out, but he does present a fairly good case to document his assertion that, in general, appointments have been "political" in the large sense that the President was concerned with the judge's basic ideology in respect to political, economic and social matters. But history also demonstrates that judges when faced with the responsibilities of their position often evince a judicial philosophy and follow a course of action that prove surprising to the appointing authority.

The author is concerned with proposals and movements in force, particularly those initiated by the American Bar Association, for securing non-partisan appointment of judges. The author fears that if the Bar Association is to play any part in the appointment process, this will become a vehicle for limiting Supreme Court appointments to men whose political and economic predispositions are agreeable to the organized bar. In the part of the book dealing with external forces operating upon the Court, the author speaks of lawyers, judges, and their professional associations and their impact upon the Supreme Court. He spends some pages examining and criticizing the role of the American Bar Association in its attempt to influence the Supreme Court. Attention is also given to the Conference of State Chief Justices which in 1958 issued a statement critical of the Court. This reviewer feels that Professor Schmidhauser in developing this phase of the subject, whatever the merits of his views, has seized upon what appears to be one of the less influential of the external pressures operating on the Court. Professor Schmidhauser concedes (p. 92) that the American Bar Association's criticisms and proposals and the Statement by the Conference of State Chief Justices have not up to this point had any perceptible effect upon the Supreme Court. Indeed, if one is to discuss the external forces operating on the Supreme Court, it would be much more useful to speak of the professional lobbyists that Professor Schubert refers to in Part I of his book, namely, the various organizations that appear so frequently before the Court either to argue cases ostensibly instituted by private parties or to submit briefs as *amici curiae*. These organizations have a more direct access

to the Court and it is fair to suggest they are more influential than outside organizations like the American Bar Association. Moreover, the greatest single force operating by way of an external restraint on the Supreme Court is one which Professor Schmidhauser disregards and that is the force of public opinion as reflected both in the press and as in Congress. History makes clear that the Court over a period of time does conform to dominant forces of public opinion and that sensitivity to congressional criticism and reaction plays its part.

In the third part of his study the author portrays in an illuminating way the evolution of the Supreme Court's internal procedures and customs. Emphasis is placed upon Mr. Chief Justice Marshall's influence in developing procedures and customs designed to secure institutional unity and which continued operative for a long time. In the chapter entitled "A Contemporary Appraisal of Procedures and Customs," the author devotes some pages to the Court's certiorari policy, the hearing stage, the conference stage and the assignment of cases, and the preparation of opinion. He points out that while the internal tradition in Marshall's day favored judicial unity, the present trend is in favor of the writing of multiple opinions and the free expression of divergent judicial viewpoints. This trend, in his opinion, is attributable to the congressional grant of discretionary review authority, with the result that the Court decides only the more difficult cases, and to the impact of a liberal legal philosophy that favors the individual freedom and responsibility of the judges and stresses the value that stems from the competitive clash of ideas.

In a short concluding chapter, the author lists three categories of Supreme Court judges — the great judges, the judges with more than average ability and legal training who conscientiously fulfilled their duties with rigor and high intelligence, and the mediocre judges. What, according to the author, determines greatness on the high bench? "In the context of the particular requirements of service on the Supreme Court, the attainment of greatness has usually been based upon a combination of personal qualities such as political sagacity (frequently called judicial statesmanship), high intellectual ability (but not necessarily philosophic training or detachment), and a flair for literary accomplishment." (p. 154)

Professor Schmidhauser's highly informative and instructive book makes good and inexpensive reading for anyone interested in learning more about the judges and the way in which they carry on their work.

Professor Schubert's and Professor Schmidhauser's books are particularly instructive in portraying the way the Court works and the factors that contribute to influence decision-making. Professor McCloskey's book, on the other hand, is directed to an understanding and evaluation of the Supreme Court's role in our constitutional system. Placing the problem in historical perspective, he portrays the emergence of the Court's power and the significance of judicial review as the Court in successive stages of our national history placed the weight of its power behind values currently dominant in American life.

The second to last chapter presents a critical examination of the Court's present attempt to find a role for itself in the protection of civil liberties. It furnishes an excellent, concise statement and critique of the Court's work in the years since the judicial revolution of the 1930's when the Court abandoned its role of furnishing constitutional protection for a laissez-faire economics.

It is the book's last chapter, however, in which Professor McCloskey discusses the basic problems of judicial review in a democratic society, that the reviewer found most interesting and stimulating. The author's basic concern is with the question of how actively the Court should assert its power at the expense of legislative policy. Dealing with this problem in the context of the Court's present concern with civil liberties, the author finds that the resolution of this question is not easy. Should the Court stoutly maintain freedom of speech and press by broad and bold strokes that rest on absolute interpretations and result in frustration of legislative policy based on dominant moods of the day? Or should it adopt a passive attitude that allows virtually no room for judicial review? Professor McCloskey admits that it takes extraordinary ability and intelligence for the Court to pursue a path whereby, on the one hand, it will avoid the excesses of power that characterized the Court's performances in past years and, on the other hand, do justice to its role as a protector of constitutional liberties. Professor McCloskey, like others who have dealt with this problem, proposes no formula or solution in answer to this basic question, although he seems generally to lean in favor of the degree of judicial self-restraint that recognizes a proper place for the play of dominant political forces, since he feels that the Court can neither lag far behind nor forge far ahead of the main currents of public sentiment. In saying this he does not mean to minimize the Court's peculiar responsibility under our system for taking the longer view than that customarily expected of the legislative branch. The author wisely observes that "the Court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it." (p. 229) The judicial policy that practices self-restraint while at the same time laying stress on the long-run view calls for rather extraordinary talents of character and intelligence. "It requires judges who can practice the arts of discrimination without losing the light of reason and getting lost in a welter of *ad hoc*, pragmatic judgments." (p. 230)

Professor McCloskey's perceptive and penetrating study of the Court's role in exercising its power of judicial review sheds light and tenders good counsel in an area too often obscured by the heat and passion of controversy. This excellent book deserves wide reading.

*Paul G. Kauper,  
Professor of Law,  
University of Michigan*