COURTS IN AMERICAN POLITICS

Readings and Introductory Essays

HENRY R. GLICK

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PREFACE

Courts in American Politics is designed for undergraduate students in classes in judicial politics and process where original social science research is to be used, generally in conjunction with a textbook. Readings in judicial research add interesting real-life information about events taking place in courts and politics and provide analysis of how the judicial process actually operates. However, getting access to these materials is often difficult and cumbersome. Research articles are found in an increasingly varied set of journals, and they often are very lengthy and include much detail on the methodology and statistics used in the research. While this information is important to other researchers and graduate students, it often goes beyond the needs of undergraduates or others who usually have not had an opportunity to achieve, or do not otherwise need to attain, a high level of knowledge of statistics and research methodology.

With this problem in mind, the readings in this volume have been selected and edited so that students with no special knowledge of statistics and methodology can understand and appreciate the subject matter and the important findings of the work that is being done on the judicial process by social scientists. A few selections involve some rudimentary knowledge of statistics, but the Appendix introduces and explains most of the techniques used in these pieces. Simply put, the aim of the book is to portray courts as integral parts of politics and to make research about courts and the political process easily accessible to students.

A number of scholars made helpful comments about the selections and organization of the text and the essays. In many instances, their suggestions were put into place. My thanks go to Kristin Bumiller, William Claggett, Sheldon Goldman, Melissa Hardy, William P. McLauchlan, Joha Grubl, David Neubauer, and Elliott E. Slotnick. I also appreciate the assistance of Helen Carroll, who helped with various stages of the project. Finally, my sincere appreciation goes to the following reviewers for their many helpful comments and suggestions: Bradley Canon, University of Kentucky; C. Neal Tate, University of North Texas; and John Winkle, University of Mississippi.

Henry R. Glick

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Introduction

Celebrating a big win by the college football team in the home stadium, carloads of happy fans joined spontaneously in a snaking procession of vehicles. Weaving in and out of winding campus streets, they drove past fraternity and sorority houses and student apartment complexes already filled with partygoers. A noisy blending of honking horns and shouting voices created just the right background for joyful students who waved beer cans in toasts to each other and to the more sedate older fans marching to nearby parking lots.

On one of those busy streets of student apartments, nearly forty people crowded onto a small second-floor balcony. The stereo blared hard rock, and though there was little room for dancing, the guests did their best while others handed out canned refreshment. As one more guest pushed through the open sliding-glass doorway onto the balcony, the floor complained with a long, low groan and lurched outward and down. Everyone landed in a pile 10 feet below on the lawn, tangled among the joists, two-by-fours, and support posts with their freshly exposed clawlike nails. No one was killed, but several students had broken bones, deep cuts, and concussions and spent two nights in the hospital. The party was over...and the lawsuit began.

DISPUTES AND LAW

The accident and its consequences seemed clear-cut, at least until a flurry of facts and their multiple interpretations came out. One student, in touch with the family lawyer within hours of the accident, claimed that the balcony clearly had not been anchored properly to the wall. The owner of the building surely would be liable, since he had not complied with county building codes. His insurance company would have to pay. But that was only the first claim. No one had yet carefully checked the building codes or the structure, and the owner of the building was saying nothing. A day later, the city building inspector concluded that the balcony had not been properly anchored to the wall but that it also had held more people than allowed for by its design. In his view, the balcony probably would not have fallen if it had not been overloaded. He added that he believed it was the responsibility of the apartment manager to warn residents to limit the

number of people allowed on such balconies. His statement of the facts seemed to cloud the picture, making it unclear whether the construction or the number of people on the balcony was the problem.

Who should be held accountable? Is the owner of the building expected to be familiar with the building code and architectural design and to know how the balcony was constructed, and, therefore, should he be held accountable? Or can he rely on the builder and the architect to assume responsibility for the building's proper design and construction? Should the city building inspector's office shoulder some responsibility for having approved faulty construction, if that is the case? Should they all have foreseen that in an apartment complex designed for undergraduate students, exuberant parties might result in overloaded balconies, and should they have built accordingly? Should the apartment manager have cautioned students not to load onto the balcony? Should the host of the party have worried about having too many guests on the balcony? Should the guests themselves have realized that the balcony was not built for so many people, jammed close together as if trying to set a record for the number of bodies on a balcony? Has it clearly been established that there *were* too many people on the balcony?

Who can sue whom, and what can the injured expect to get? What does the law say on this issue? Is there legislation, or can past judicial decisions in similar cases (precedents) provide some guidance? How similar is this case to others? How would the insurance companies for the owner and the builder react? Would the case go to trial? How would a judge and jury look upon the dispute and the people involved? Whom would they hold responsible, and how much would they award the injured or the owner of the building if the builder were found at fault? Should the injured be awarded compensation only for the actual costs of their medical treatment and perhaps time lost from part-time jobs, or are they entitled to additional amounts for "pain and suffering" due to personal trauma and upset that will cause some of them to fall behind in their schoolwork or perhaps drop out for the remainder of the term? In the meantime, how would students in the hospital pay for their medical treatment, and the owner of the building for repairs? Why would anyone sue in the first place? After all, were they not all friends just having a good time? Accidents do happen...or do they?

Attributing fault in an accident may seem obvious until all the people who have a financial or personal interest in it—the students, the owner of the complex, and others—begin to think about their own liability and their strategy for protecting themselves or getting what they can from others who immediately are seen as "on the other side." The balcony accident and many others like it quickly raise many questions about law and court systems and the resolution of disputes. One thing that becomes evident very quickly is that little is immediately clear, obvious, or automatic in the judicial process. Solutions sometimes seem clear and obvious after all the options have been considered, the strategies have been spent, and the final decision is announced, but solutions are not so obvious while we are in the process of creating them.

People curious about courts and law frequently ask, Can one person sue another for_____? (They fill in the blank with whatever dispute they have in mind.) A second question which underlies the first is, What does the law allow or require? These are reasonable questions because the fundamental function of courts is to settle disputes and we expect them to operate according to law. The answer to the first question is always yes: One person can sue another for anything. But that does not get us very far in understanding courts and law. Since not everyone does sue and, of those who do, not everyone wins, more important questions are these: Why do you want to sue? What would you expect to get as a result? How do you go about doing it? These questions are much more difficult to answer, and lawyers, who frequently are asked for their advice, can give only their best guess based on their experience. They may offer, in addition, to take the dispute to court in order to find out what the law is, for a decision of the court determines the law. Finding out in court usually is a costly and grueling experience, and most of us would like more certainty before taking the plunge. But often there is little certainty about how courts will resolve disputes. Indeed, if the law were perfectly clear, there would never be a need for trials, since both sides, having access to the same lawbooks, would know how the dispute must be resolved.

Curiosity concerning opportunities for suing and what the law permits or requires often includes an assumption that there is no disagreement about the facts in an imagined dispute and that it will be crystal clear who is at fault and why. But the balcony accident or a few episodes of *People's Court* quickly dispel the notion that right always lies clearly with one side or the other and that the facts are not seriously in dispute and cannot be interpreted in different ways. There are always many facts in cases, not only the ones that we think are favorable to our side. Consequently, there is much more to understanding courts and the judicial process than simply identifying one or two appropriate laws that cover a situation and fitting the "indisputable" facts into them.

GOING TO COURT

Perhaps a preliminary question to this talk of disputes, court cases, and law is, Why would the injured students or the owner of the building sue anyone or even think in terms of payment for injuries and other costs? This is a difficult but crucial question because it has much to do with the role of courts in America and our uses of them. Unlike legislatures or governors and Presidents, courts can do nothing until people bring cases to them. Courts are not self-starting institutions in which judges decide that certain interesting disputes fomenting out in society ought to be brought into court for a decision. Courts must wait until people decide that courts are the appropriate place for dealing with their disputes. Consequently, the decisions that people make about the function of courts and law in resolving disputes and the opportunities for individuals to use these means are crucial for determining the role that courts perform. Unless

people are willing or able to go to court, there can be no judicial action. In most instances, going to court is a last resort that is used only when other methods for resolving disputes have failed to produce satisfactory results for both sides.

The number of court cases is increasing very rapidly in the United States, and finding things for courts to do is not a problem or an issue. In fact, the opposite is true—many commentators believe the courts are overloaded with cases. Many reasons have been given for this development. One is that the United States has become one of the most litigious societies in the world—people are inclined to sue for nearly any reason and to try to get as much money from their opponents as possible. Frequently, this explanation is accompanied by the view that courts are involved in a much wider range of social issues than is proper. Somehow, people have been encouraged to use the courts to excess. Courts not only settle genuine private disputes but also have become involved in very controversial issues, involving competing rights and power in society, such as abortion, many forms of discrimination, the proper management of state institutions, and the reform of criminal justice procedure.

A different view, however, is that in time past, people injured in accidents may not have considered suing because of the view that accidents just happen. They are due to bad luck or an act of God. Also, in the early days of the industrial revolution, labor was not organized and had little political power; the law favored the owners of factories, making it difficult for workers to obtain compensation for their injuries. But labor-management relations have changed in the twentieth century, and in our modern and sophisticated technological society, it is increasingly possible to determine who is responsible for accidents, even intricate ones involving nuclear power plants, river and air pollution, space shuttles, automobiles, or drugs thought helpful but which turn out to be harmful. Bad luck has been determined to be the fault of human beings, and science and technology makes it easier everyday to uncover who is at fault. And when we know who is at fault, we expect compensation.

Closely related to society's ability to hold people accountable is an increase in our sensitivity to individual rights, equal treatment, and freedom of expression. In the past thirty years, courts and legislatures have greatly expanded the amount and scope of law enhancing individual rights and equality. Groups that in the past were thought to have few rights—blacks, women, students, religious minorities, criminal defendants, prisoners, the mentally ill, the handicapped, the elderly, the poor—are more inclined today than in any time prior to the 1950s to assert their individuality and their rights to personal freedom and fair and equal treatment. For example, public schools today take a great legal risk in arbitrarily banning youngsters with AIDS from the classroom simply because other students or their parents fear or loathe them. Schools cannot suspend or expel students for disciplinary purposes without a very good reason supported by written school policy. People are less likely to go meekly; they are inclined to assert their rights to be in the classroom and to be treated like other individuals, according to standards of equality and just process. Cities

which have systematically segregated blacks in separate schools and public housing also face demands for integration and equal housing opportunity. If schools, city governments, or other institutions do not respond to demands for equal treatment, going to court sometimes is the next step in the search for a solution. The revolution in individual rights and freedom since the 1950s has created what is probably the most controversial set of issues for American courts in the country's history. Courts are the main focus of social conflict surrounding individual rights because they frequently have led the way in expanding rights for unpopular groups and minorities—rights which sometimes conflict with the asserted rights, preferences, or privileges of well-established majorities.

We are also increasingly a nation of strangers, meaning that many of our interactions take place with others whom we do not know and with whom we have no personal relationship. When we pay our rent, car installments, or college tuition, we frequently pay them to large realty firms, banks, or university bursar's offices—impersonal institutions with no faces or only the faces of clerks who take our money or who mail us a return envelope for the next payment. Automobile accidents, one of the largest categories of disputes, almost always occur among strangers. In the case of the falling balcony, most of the people involved are bound to be strangers or only casual acquaintances. When serious disagreements develop, there is no social glue or expectation for a future personal relationship that prevents disputes from developing into lawsuits if compelling reasons warrant such action. Consequently, the impersonality and complexity of modern society have much to do with the conditions under which people transform disputes into court cases.

Although the focus thus far has been on accidents and other personal disputes (civil cases), complex urban society has a similar effect on how the judicial process treats crime. Police and prosecutors are much more likely to view assaults or cases of robbery and theft which occur between strangers as much more serious than similar crimes among relatives, lovers, or friends. These latter crimes frequently are considered extensions of personal relationships, albeit terrible ones, and are not defined as serious criminal matters worthy of police, prosecutor, or court time. Moreover, in big cities with more crime than police can thoroughly investigate, lesser felonies, including robbery and mugging without serious injury, receive lower priority than violent rapes and murders. Serious crimes against strangers are more likely to occur in big cities rather than small towns and rural areas, and with increased urban growth and new social problems, such as the huge volume of drug trafficking, these kinds of crimes will become more plentiful.

Consequently, there is plenty of crime and ample opportunity for police and prosecutors to take people before the law. But since not all the law is or can be enforced all the time, police and prosecutors exercise wide discretion in deciding which crimes and criminals deserve attention. Their decisions are determined informally in their daily work and through internal office policies. Understanding how they make their decisions and the content of their policies is

similar to understanding the road to litigation taken by individuals in civil cases. In neither instance do the possibilities allowed or required by law give us a satisfactory answer.

Just as judicial decisions affecting civil rights and personal freedom create controversy, crime and the courts also is a frequent political issue. Ironically, when people think about courts and crime, they tend to focus on the political charge that the courts are too lenient with criminals, letting many go without jail terms or freeing defendants on legal technicalities. The public generally does not perceive or react to police practices or criminal justice policies which may prevent many criminals from being brought to justice in the first place. Despite their reluctance or inability to make arrests and prosecute many criminals, police and prosecutors are seen as crime fighters upholding law and order. Politicians seeking election, including recent conservative Republican Presidents, have painted a vivid picture of innocent citizens being attacked by strangers in the streets with the courts taking the side of the criminal, not the victim. George Bush was especially pleased to receive and publicize his endorsement for President in 1988 by an extremely conservative Boston police patrolmen's organization, and he characterized Democratic candidate Governor Michael Dukakis of Massachusetts as soft on crime because of the governor's appointment of "soft" judges and support of a prison furlough program.

One reason that courts are the focus of public criticism is that the U.S. Supreme Court took the lead during the 1960s and early 1970s in enlarging the scope of defendants' rights. Another reason is that judges rarely defend themselves against political attack, preferring the traditional judicial role of remaining silent and detached from the political fray. This leaves the field open to campaigners anxious to demonstrate their own toughness on crime. Consequently, crime and the courts is a frequent political issue, one that constantly focuses on the proper role of courts in America.

NEGOTIATION

Once a dispute becomes a possible court case, assessing what the law may require or permits is a major part of deciding how to proceed. But, as in the case of the falling balcony, liability may be unclear, since there are several parties with conflicting interests and responsibilities. It is very unlikely that any of them knows very much law or fully understands their liabilities or opportunities. Some of them, especially those with serious injuries and the owner of the building, probably will look for a lawyer in order to understand their position and their strategy in the dispute. Lawyers, especially in large cities, tend to specialize in certain kinds of disputes. Moreover, they even specialize in the kinds of litigants they serve (e.g., injured and suing versus insurance companies and defending); through law and the courts, they represent particular kinds of interests in society.

Even with lawyers giving advice, the solution to a dispute is never certain. There probably is a lot of pertinent law, and some of it is conflicting and con-

fusing. Legislation frequently is vague and general because it is designed to cover a multitude of roughly similar situations and rarely applies precisely to an individual case. It is up to lawyers and judges to interpret and apply legislation. Previous court cases will help as guidance, but there have been thousands of accident cases similar to the balcony episode, so lawyers representing each of the disputing parties probably will be able to find precedents from various courts to justify their position on behalf of any of the individuals who might sue each other. Conflicting judicial policy has become a matter of official attention. Former Chief Justice Warren Burger was so concerned in the 1980s with conflicting decisions of the federal courts of appeals in similar cases that he proposed a new national court which would produce final binding decisions in cases involving policy conflict among those federal courts. Also, the U.S. Supreme Court agrees to hear certain cases because of policy conflicts among the federal courts.

The language of insurance policies will have some effect on recovery in the balcony accident as well, but each insurance company involved would rather see another company face the liability and have to pay. Even if the apartment owner's insurance company pays for the students' injuries, that firm may seek reimbursement of its costs from the insurance company of the builder, the architect, or the city building inspector. It is another lawsuit in the making, perhaps.

Uncertainties in law and the emotional and financial costs of going to court lead most people to settle their disputes through informal negotiation. Getting something and giving up something else in return often looks much better than taking a chance on getting nothing or giving up a lot. Negotiation takes place with the law never far from mind, however vague and unclear it may be. Lawyers for each side make their best guesses about how they and their opponents, as well as judges and juries, might interpret the law and the facts if the case were to go to trial. Negotiation is not governed by formal rules of law; it depends on the individual knowledge, skills, experience, and strategies of the lawyers or of individuals who negotiate disputes for themselves. Although most disputes are settled before they become court cases and most cases are settled before trials are held, the process of negotiation is an important part of the total judicial process because disputes always can become court cases and they are settled with thought given to what can happen in court.

Negotiated solutions also take place in criminal cases. Plea bargaining is a staple of the criminal courts—a process in which defendants plead guilty prior to trial in return for court leniency, usually a lighter sentence than if they were found guilty after a trial. Like private negotiation, plea bargaining takes place with the law in mind, meaning the range of charges and sentences that might be levied against the defendant as well as the admissibility and credibility of evidence and testimony. Criminal law provides so much leeway in interpretation and application that it not only permits but requires prosecutors and judges to exercise their own evaluations and policy preferences concerning how to deal with crime and criminals. A particular criminal act, such as stealing from another, may be classified as robbery, theft, or larceny and may be aggravated by assault, the use of a weapon, possession of burglary tools, and so on. These

various crimes, all stemming from a single act, carry substantially different penalties. Deciding which crime to charge and which penalty to pursue is totally up to the discretion of prosecutors, and while the sentence imposed comes from judges, it frequently reflects agreements that prosecutors and defense attorneys reach in each particular case. Thus, the answer to the earlier question concerning what the law allows or requires is found, not in the formal law, but in the daily behavior and policy decisions of judges, lawyers, and prosecuting attorneys.

DECIDING CASES

If negotiation fails in a case, the disputants always can look to a judge or jury to decide who is at fault and how much one side must pay to the other. In the balcony accident, several different lawsuits may arise as the injured and others cast their legal nets far and wide in the search for defendants who might be held liable and who might be able to pay. The law for the judge is just as plentiful and uncertain as it is for the opposing attorneys. Juries typically are unfamiliar with law and must depend on what they hear in court and what the judge tells them about the law at the end of the trial. In the balcony case, how will the judge and jury see the facts and the law as presented by the opposing lawyers? They will have to grapple with all the questions presented at the beginning of this discussion, and probably others as well.

There are various solutions to this puzzle. In cases such as the balcony accident, personal sympathies play a part, as does the way that judges and juries fit the facts into their own experiences and understandings of daily life. Some jurors will probably be very sympathetic to the students who were injured, reflecting fondly upon their own experiences as young people or their children's experiences during celebrations after a ball game or other similar event. Others probably will be less sympathetic, thinking that the students should have known better than to load onto a small balcony. Other jurors may feel that the students and the apartment owner and manager share responsibility. For some jurors, broad social values or ideology may have an effect, such as viewing the case as part of the struggle between the powerful and the weak and the rich and the poor. In this case, the students might be viewed as part of a class of people injured through the fault of those with wealth and power. Sometimes, juries and judges hold insurance companies and large businesses with "deep financial pockets" financially responsible for accidents even when others are partly at fault. Insurance companies and their business customers are anxious to change this interpretation of law through legislation. If the jury as a whole decides the students are entitled to some compensation, unsympathetic jurors may try to hold the amount down as a form of compromise settlement. Whichever views prevail, it is clear that the outcome is not certain but may hinge on the attitudes and values of people making the decision.

Many cases invite the influence of personal differences on decisions, especially cases that pit clearly identifiable social groups or positions in society against each other. Examples include cases in which criminal defendants appeal

their convictions on the basis of claims that their rights were violated by the police during arrest or interrogation; minorities, women, students, and others suing governments and private organizations regarding discrimination or unfair treatment; governments suing taxpayers, businesses, or labor unions in economic regulation and tax matters; labor unions suing businesses in labor disputes; and so on. As in the balcony accident, thinking that one group or another is right or wrong depends partly on our own personal backgrounds, life experiences, and resulting attitudes.

The importance of personal differences is evident in various parts of the judicial process. In choosing a jury, lawyers try to uncover as best they can the beliefs and values of potential jurors which may lead them to favor one side or the other in a particular case. Similarly, Presidents and governors are concerned with the backgrounds and attitudes of potential judicial nominees, since they are interested in getting people on the courts who share their values and beliefs. This always has been the case for the U.S. Supreme Court, where it is abundantly clear that the justices have enormous discretion in interpreting our short and vague Constitution and much general statutory law. But it increasingly applies to other appellate and trial courts as well because of the leeway in law and the importance of judicial decisions at all levels. Social scientists also frequently examine variations in judges' and jurors' political party affiliation, religion, work experience, education, income, and other characteristics that may provide evidence and understanding about how personal backgrounds and attitudes influence judicial policymaking.

All of this is very far from formal law. It underscores the fact that we get little information about courts from looking only at formal law and procedure but must look carefully at the actual behavior of individuals and institutions that populate and manage the judicial process.

AFTER THE DECISION

When a court case is over and the judge or jury has reached a decision, we often assume that the matter is settled. We tend to think of a court case as raising the flag: Once it is hoisted on the pole, everyone salutes. In an accident case, the loser will pay the winner whatever compensation the court has ordered; in a case of race or sex discrimination, the loser will do whatever is necessary to remedy the situation, such as integrate the schools or change the rules for admission to social clubs. The courts can file the case and take up the next dispute.

Sometimes cases do end that way. But in many cases, losers do not voluntarily pay up. Not only might they appeal the decision to a higher court, hoping for a reversal (a different interpretation of the law), but they might simply refuse to pay or claim that they are unable to do so. Collecting what is owed rarely is automatic and may require additional judicial proceedings. Much to the surprise of some litigants, courts do not act as collection agencies but only permit the winner to recover from the loser. In cases of discrimination or cases involving the treatment of prisoners or patients in state prisons and hospitals—