

HENRY R. GLICK

COURTS
POLITICS
&
JUSTICE

THIRD EDITION

COURTS, POLITICS, AND JUSTICE

THIRD EDITION

Henry R. Glick

The Florida State University

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COURTS, POLITICS, AND JUSTICE

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HENRY R. GLICK received his Ph.D. degree in political science from Tulane University. He has taught at the Florida State University since 1968 where he also is a research associate in the Institute on Aging. Among his publications are *The Right to Die*, *Supreme Courts in State Politics*, *State Court Systems* (coauthor), and *Courts in American Politics* (author and editor). He also has published numerous articles and chapters on courts and the political process in political science and law journals and anthologies.

To I. David Glick

PREFACE TO THE THIRD EDITION

In addition to bringing all of the materials up to date by discussing recent scholarly research and major events involving the courts, I have made a number of important changes and additions to this edition of *Courts, Politics, and Justice*. First, several reviewers have commented that the illustrative boxed inserts help to bring courts and politics to life, and they urged me to add more of them to each chapter. Therefore, I have increased the number of these inserts, and I have added tables, charts, and diagrams that also more vividly portray main points discussed in the chapters. Each chapter also concludes with a list of suggested additional readings directing students to more information. I also have expanded the table of contents to include the major elements of each chapter.

The third edition also includes several new topics and expanded discussion of others. A basic change concerns Chapter 2, Organization of Courts. This chapter has been enlarged to emphasize the distinctive role and work of federal and state courts in separate sections. Organization charts, illustrative tables, and inserts also illuminate the separate and interactive functions of federal and state courts in the judicial process. I also have expanded Chapter 3, Lawyers and Law Practice, to include discussion of lawyers' relationships with their clients, the availability of lawyers, lawyers' ethics, and their strategies in representing their clients. Chapter 6 includes a more complete discussion of sentencing within the context of plea bargaining.

Other changes include a discussion of the war on drugs, particularly its impact on the work of courts and the rights of criminal defendants. I also have added a discussion of the death penalty in the final chapter as part of the rights of criminal defendants. Also new are discussions of recent controversies concerning the election of state judges and the selection of the new conservative justices for the Supreme Court. I also have expanded the discussion of public interest law, public opinion and the Supreme Court, and the role of the Supreme Court and state supreme courts in judicial review.

Finally, I have brought the discussion of civil rights, rights of criminal defendants, and women's rights up to date with special emphasis on recent policy revisions by the Rehnquist Supreme Court. I also have enlarged the discussion of the politics of abortion—included as part of women's rights—to

illustrate that the Supreme Court has an important, but not an exclusive, role in this and other controversial national policies.

I would like to thank the many reviewers who made numerous valuable suggestions for the third edition. I appreciate the comments of Professors Nathan Brown, George Washington University; Gregory A. Caldeira, Ohio State University; Bradley C. Canon, University of Kentucky; Melinda Gann-Hall, University of Wisconsin—Milwaukee; James L. Gibson, University of Houston; Sheldon Goldman, University of Massachusetts—Amherst; Steven H. Hatting, University of St. Thomas; Patricia Pauly, University of Kentucky; Neal Tate, University of North Texas; Michael Tolley, Northeastern University; and Diane Wall, Mississippi State University.

My wife, Joy, also has contributed mightily to this edition by putting up with my preoccupation in writing it.

I dedicate this edition of *Courts, Politics, and Justice* with love and high regard to my brother, Dave, professor of communications and education at the State University of New York College at Oswego. Although we work different parts of the liberal arts, we hear many of the same drums and ask many of the same questions.

Henry R. Glick

PREFACE TO THE SECOND EDITION

It has been very gratifying to write the second edition of *Courts, Politics, and Justice*, reflecting the encouraging reception of the first edition among teachers of the judicial process and their students. I am especially pleased that I have had an opportunity to share my perspective of courts and politics with so many students beyond my own classroom. It has been good to learn that students feel that the text brings the judicial process to life and connects courts to politics. This is my main goal.

There are several important changes in the second edition that reflect student and faculty reactions. The discussion of judicial administration and court reform has been combined with the chapter on judicial organization, making structure and organization the central theme of the chapter. There also are two new chapters. A chapter on lawyers and the law profession examines the practice of law and legal education in the United States and links them to social structure and political behavior. A final chapter on courts and social change expands the discussion contained in the first edition and concentrates on the interactions between judicial decisions, political action, and social change. The second edition also updates factual information, illustrations, and recent scholarly research throughout the text. Especially important additions concern the impact of the Reagan administration on the selection of federal judges, concern with the litigiousness of American society, and recent changes in judicial policy and its impact.

I would like to thank the reviewers who carefully read the entire manuscript and made many useful suggestions and challenged as well as buttressed my own interpretations of courts and politics. Thanks go to Professors Sheldon Goldman, William P. McLaughlin, David Neubauer, Elliot E. Slotnick, G. Alan Tarr, C. Neale Tate, Lettie M. Wenner, and John Winkle. I also am grateful to my wife, Joy, for her consistent support and enthusiasm . . . and for relinquishing the word processor even when it was her turn to get her own work done!

This edition is dedicated to the memory of George W. Pruet, Jr., a recent graduate student and colleague at the Florida State University who was in the

early years of his career in judicial politics at the University of Akron. It also is dedicated to Kenneth N. Vines, who introduced me and several colleagues during the 1960s at Tulane University to the new and emerging world of judicial politics. Both George and Ken have had a lasting impact.

Henry R. Glick

PREFACE TO THE FIRST EDITION

Courts in the United States have growing opportunities to decide many new and unusual issues. As society and technology change at an ever faster pace, problems come to judges which most people have never thought much about or imagined before. However, judges often disagree on solutions to new and even customary disputes, and there are many differences in how similar cases are decided. Who uses the courts, what kinds of issues judges decide, how judges form their views, how they apply them to cases, and how their decisions affect society are important parts of *Courts, Politics, and Justice*.

But there is much more to courts. The number of disputes or conflicts that are decided by courts drops sharply at each stage of the judicial process. Most disputes never get to court at all but are settled informally. Many cases are settled before trials begin, and only a few trial decisions are appealed. Thus, while Supreme Court and other appellate decisions are important, most disputes are settled informally and locally. The first stop in the courts is usually the last stop.

This book has several objectives that reflect different aspects of courts. *First, it looks at the judicial process in all types and levels of courts in the United States.* Many books concentrate on the United States Supreme Court or the federal courts: but the odds are very high that when people go to court, they go to state court. Therefore, this book presents a broader perspective of the judicial process, and it covers state and federal and trial and appellate courts.

The second objective is to explain what courts do, on the basis of recent social science research. The text describes what goes on in court, but it also is important to explain *why* courts work as they do. There is a great deal of evidence that formal law cannot adequately account for judicial behavior and that social science research provides more complete and realistic explanations. Although the book rests heavily on social science research, it is included in ways that readers without special knowledge of the courts will understand and can use to develop an informed outlook on the judiciary.

The text also includes excerpts from news stories and summaries of actual cases and events involving the courts. They provide vivid examples of the operation of the judicial process and illustrate major points made in the chapters. These examples can also be the basis for class discussion of major topics.

A closely related third objective is to link courts to politics. Explaining judicial behavior means connecting courts to the broader social and political context in which they operate. But it also means seeing courts not just as formal legal institutions that are affected by an outside world of politics, but as major and integral parts of state and national politics.

A number of people have helped me along the way. I appreciate the hard work of George Pruet and Suzy Parker in collecting and organizing much of the background material. The staff of the Department of Political Science “word processor team” never faltered, and I thank Vicki Harley and Yulondia Wilson for their invaluable assistance. Professor Theodore Becker sent me interesting materials on mediation, and Professors Bradley Canon and Charles Johnson shared their latest ideas on the impact of judicial policy. I am especially indebted to Professors Sheldon Goldman, David Neubauer, and Elliot Slotnick, who read several drafts and commented extensively on the entire manuscript. Professors Leonore Alpert, Burton Atkins, I. Ridgeway Davis, David Gow, William P. McLaughlin, and Bruce Murphy read various parts of the manuscript and offered many other helpful suggestions.

Henry R. Glick

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1

COURTS, POLITICS, AND JUSTICE

Courts and the judicial process usually bring to mind a picture of a judge, draped in a black robe, overseeing a trial. When a judge enters a courtroom, everyone rises and stands quietly until he or she sits behind the elevated bench and raps the gavel to start the proceedings. In courts composed of a number of members, it is common for judges to march in together quickly as if choreographed on cue to take their seats in a flourish of flowing robes. Loud talking or even whispering among court spectators is not permitted.

At the U.S. Supreme Court severe-looking ushers holding long sticks roam the aisles, and they poke these sticks at individuals who talk too loudly or distract others from focusing on the front of the large courtroom. Called “the Marble Palace,” the U.S. Supreme Court building is very ornate, with high ceilings and decorated walls, polished floors, and long benches that resemble pews in a church. Reverence and respect are expected and enforced. Other courtrooms are less magnificent, but the floor plan, furniture arrangement, and the judge raised above everyone else are similar and clearly show who is in charge and what goes on.

The odds are good that few of us picture a black or a woman presiding over a court. There is an increasing number of female and black judges in the United States, but chances are most of us still envision a middle-aged white man, perhaps slightly overweight, with thinning or silver hair. Judges are thought to be slightly aloof, but patient, understanding, and unlikely to lose their tempers. They also run their courts fairly but firmly. Judges are not too tall or too short or too thin, and they do not sport beards or styled haircuts. Of course, judges *do* come in all shapes, shades, and sizes, but Chief Justice William Rehnquist and Associate Justice Antonin Scalia *really look* like judges.

Most judges also do not hold press conferences, give speeches, or write for popular magazines or even law journals to explain their decisions or comment on public issues which may come before the courts. Even a judge who has held many other political positions prior to becoming a judge seems to change into a new person after donning judicial robes for the first time. The once very friendly and outgoing politician becomes a little distant, personally reserved, and removed from the day-to-day hustle and bustle of state or county politics. As the political role changes, the new judge prepares to perform different work according to different standards and expectations about appropriate behavior. Judges are public officials, but most of us expect them to be different somehow from other politicians and to take special care about how they act both on and off the court. Judges should act . . . well, like . . . judges.

Popular views of courts also include the belief that when a citizen gets her or his day in court, a good attorney can get any “nice” or “good” person out of trouble. TV programs, such as *L.A. Law*, *Divorce Court*, and the afternoon soap operas often focus on the intelligent, hard-working, and dedicated lawyer who represents glamorous, interesting, and usually white, middle-class people who are wrongly accused of murder or caught up in a nasty divorce—typically with plenty of adultery. Criminal defense lawyers always find the truth by the end of the program and just barely prevent conviction of the innocent, virtuous defendant. The police and prosecutors generally are portrayed as decent people, too, sometimes not quite as bright or as dedicated, but they do their job in a scramble for clues, culprits, and crime. Opposing attorneys are pictured as cordial adversaries who, like knights of old, joust before a judge and jury. The defense lawyer, often spurred on by a fair lady, always comes out on top. Justice triumphs in the end and the truly guilty get their just deserts.

Justice triumphs in the ideal judicial world because decision making is seen as objective and impartial. Unlike legislators or governors, who are expected to be partisan or to campaign for particular policies, judges are viewed as neutral referees and appliers of the law. Often in conjunction with juries, they review the facts, examine the law, and reach proper decisions without favoritism to anyone. Judicial decisions are based on what the law requires, not on political promises, policy preferences, or personal sympathy. Equal treatment before the law, justice according to law, a government of laws, not of men, are the watchwords of American justice.

COURTS AND LEGAL CULTURE

Beliefs in equal justice and the rule of law, jousting lawyers (called the *adversary process*), and objective decision making are parts of legal culture.¹ Social scientists use the term “culture” to refer to basic values, beliefs, and expectations about social behavior. Legal culture deals with particular values and perspectives about how disputes are settled, how courts work, the content and role of law, and the behavior of people who manage the judicial process.

The Distinctiveness of Courts

There are many sets of beliefs in legal culture that shape the major features of the judicial process and which *distinguish courts from other branches of government*. Although judges have some things in common with other public officials, such as being elected or appointed to office, judges usually behave very differently from other politicians and on the job.

Legal culture affects many features of courts, but it is especially visible in judicial decision making, selection of judges, public access to courts, and procedures involved in processing cases.

As indicated earlier, legal culture assumes that judges will be *objective and neutral in decision making*. They are expected not to take sides before a case is argued or be influenced by public opinion or the views of other political elites. They should remain open-minded throughout a trial or appeal. In contrast, legislators usually are elected partly on the basis of the policies they favor and the groups they support.

Legal culture also includes the expectation that society should *select the best qualified judges* regardless of their inborn personal characteristics, such as sex, race, or religion, and that judges with previous judicial experience and extensive legal careers ought to be selected over those with lengthy careers in partisan politics. Clearly, recruitment expectations for other politicians are very different, and many emphasize their previous political and governmental experience as qualifications for higher office. If judges must run in judicial elections, campaigns ought to be low-key and polite, in keeping with the aura and majesty of the judiciary. Campaigns for other public offices often are much rougher.

Legal culture also includes the idea that every citizen has a right to his or her *day in court* and that justice should be available to everyone without delay or extraordinary expense. In contrast, few citizens expect to have their personal day in a legislature. Legislatures are viewed as lawmaking bodies for the entire state or nation, not usually for individuals. Legal culture also has implications for the role of courts in making rules for society. Legal culture usually expects judges to limit themselves to making decisions that are clearly required by law and to leave new lawmaking to legislatures.

Legal culture also affects the specific *procedures* that courts use to reach decisions and distinguishes judicial decision making from processes commonly used in legislatures and the executive branch. For instance, lobbyists approach legislators and administration officials directly and personally in order to influence their decisions, and they probably call these officials by their first names after becoming personally acquainted and familiar with them. But a lobbyist who telephones a judge in order to influence a certain decision risks conviction for contempt of court! Influencing courts simply is not done that way. The only way that interest groups can legitimately influence a court is by taking part in a case that is handled like any other case, which means that there always is some distance and no private contact between the litigants and the judge. Like other